

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1136

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

Docket No. 77-1136

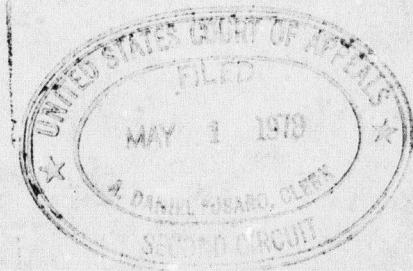
-against-

JOHN LEFEBVRE,

Appellant.
-----X

APPENDIX

GABRIEL B. LEONE
Attorney for appellant
Office & P. O. Address:
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
Tel. #212-544-8000



200 District

U.S. CODE SECTION
21 USC §§ 846 & 841

U.S. Attorney or Asst.
William J. Dreyer, Asst

OFFENSES

Conspiracy to distribute and distribution of controlled substance

Defense: ☐ CJA, ☐ Ret, ☐ Waived, ☐ Self, ☐ None, ☐ Other, ☐ PD, ☐ CD

Vincent F. Nicolosi

defendant of 17
COUNTY
10

MAGR. CASE NO.

Personal Rec. ☐
Unsecured B. ☐
Conditional Release ☐
10% De. ☐
Surety ☐
Collateral ☐
3rd Party ☐
Custom ☐
PSA ☐

Bail Not Made ☐
Bail Status Changed ☐

(See Docket)

ARREST ☐ U.S. Custody Began on Above Charges ☐ Prosecution Deferred

INDICTMENT ☐ Information ☐ 2/4/76 ☐ Waived ☐ Superseding ☐ Indict/Info ☐

ARRAIGNMENT ☐ 3/15 ☐ 1st Plea 3/15 ☐ Final Plea

TRIAL ☐ Trial Set For ☐ Voir Dire ☒ 12/1/76 ☐ Trial Began ☒ 12/1/76 ☐ Trial Ended

SENTENCE ☐ Disposition 2/22/76 ☐ Convicted ☐ On All Ch. ☐ Acquitted ☐ On Lesser Offense(s) ☐ Dismissed ☐ WOP; ☐ V ☐ Nolle/Discontinued*

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
Summons	Returned			PRELIMINARY EXAMINATION OR REMOVAL HEARING ☐ Waived ☐ Not Waived ☐ Intervening Indictment	Date Scheduled Date Held	☐ Dismissed ☐ Held for District GJ ☐ Held to Answer to U. S. District Court AT: _____ Magistrate's Initials _____
	Served					
	Arrest Warrant					
COMPLAINT				Tape No.	INITIAL/No.	
OFFENSE (In Complaint)						

Show last names and suffix numbers of other defendants on same indictment/information

DATE	PROCEEDINGS	V. Excludable Delay			
		(a)	(b)	(c)	(d)
1976					
Feb. 4	Filed Indictment Bench Warrant to any U. S. Marshal, etc. is ordered on motion of William J. Dreyer. Bail fixed at \$15,000. Govt. moves that Indictment be sealed. So Ordered.				
Feb. 20	Filed letter ordering Indictment unsealed				
Feb. 24	Filed U. S. Attorney's letter signed by Judge Foley modifying bail.				
Mar. 15	The deft. is arraigned and pleads not guilty. Thirty days to file motions. Continued on bail.				
May 5	Ready				
9/3/76	Filed Notice of Motion for Continuance returnable 9/13/76				
9/13/76	Motion for continuance granted.				
9/16/76	Filed Order of Judge Port granting continuance in the interest of justice from 9/3/76 to the first day of trials in Albany in November.				
11/30/76	Filed Memorandum of Points & Authorities & Vire Dire Examination.				

IV. PROCEEDINGS (continued)

(a) (b) (c) (d)

- 76
Dec. 1 Trial. Jury panel absent from courtroom. Defts. move for and application for presentence reports of other deft's. who have previously pled. Decision reserved. Defts. move for an application for inspection of Grand Jury minutes in re a witness. Decision reserved. The Gov't. moves for the dismissal of Counts 2 thru 10 of the Indictment-granted. Jury drawn and sworn. Two alternate jurors drawn and sworn.
- Dec. 2 Filed Order for Writ of Habeas Corpus ad Testificandum to bring Paul Moskowitz to Albany 12/2/76. Writ issued.
- Dec. 2 Trial continued. Witness ~~for~~ Robert Roth.
- Dec. 3 Trial continued. Jury absent from Courtroom. Mr. Ryan moves for application to inspect presentence reports of defts. who will be called as witnesses - denied. Defts. renew application for inspection of Grand Jury testimony of Margaret Buecher-decision reserved. Trial continued.
- Dec. 7/8 Trial continued.
- Dec. 9 Trial continued.
- Dec. 10 Trial continued.
- Dec. 14 Trial continued. In chambers Mr. Ryan moves for service of subpoena on behalf of deft. Kay upon Albany County probation Dept., etc.-application denied. Jury absent defense moves for an application for a suppression hearing in re: search & seizure-denied. Defense moves for severance in re defts. Kay & Lefebvre, or, if denied, for a mistrial - both denied. Filed ex Writ of Habeas Corpus for Paul Moskowitz.
- Dec. 15 Trial continued.
- Dec. 15 " "
- Dec. 16 " "
- Dec. 20 Trial continued. Plaintiff files 2 requests to charge, Deft. ~~xxxxxx~~ file 8 requests to charge. Judge Foley reserves decision at this time for requests Nos. 4 and 6.
- Dec. 21 Judge Foley rules on request to charge No. 4-certain paragraphs refused as too detailed. Remainder will be charged. Charge No. 6 - refused. Atty. sums up.
- Dec. 22 Trial continues-Judge Foley charges jury. Court exhibits 3,4,5,6,7,9 filed. Jury comes into Courtroom, find each deft. guilty. Jury polled, unanimous verdict is rendered by each juror in re each deft. Notes of Juror # 1, Mr. Chow, directed by the Court to be filed as Court exhibit # 10. Mr. Dreyer moves to defer sentence for review of pre-sentence investigation. Mr. Ryan, Lombardino, Lehetkin and Leone move to set aside verdict for reasons stated-denied.
- 12/14/76 Filed Sealed envelope signed by Judge Foley 12/14/76
- 12/22/76 Filed sealed court exhibit.
- 1977

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE D		
(Document No.)		(a)	(b)	(c)
<u>1977</u>				
1/3/77	Filed Copy of Letter to Judge Foley from Attorneys for defendants re: Extension of Time for Motions to set aside Verdict.			
Jan. 5	Filed Notice of Motion returnable January 17, 1977 at 10:00 A.M. in Albany.			
Jan. 5	Filed Memorandum of Law of Defendants in support of their motion pursuant to Rule 23 of the Federal Rules of Criminal Procedure to set aside the verdict of the jury against them and for a new trial and for a full evidentiary hearing.			
Jan. 13	Filed ex. Writ.			
Jan. 17	Motion for order to set aside the guilty verdict and for a new trial and for a full evidentiary hearing -decision reserved.			
12/24/77	Filed transcript of proceedings held 12/2/76 and transcript of proceedings held 12/2/76.			
Feb. 15	Filed Memo. Decision & Order of Judge Foley denying motion for a new trial			
Feb. 22	The Court advised the defendant of his right to speak in his own behalf, defendant spoke, his attorney spoke. The defendant is sentenced to custody of the Attorney General for a period of six months with a special parole term of two years on Count one. Execution of sentence is stayed pending filing Notice of Appeal. Bail continued pending appeal.			
Feb. 23	Filed Judgment signed by Judge Foley on February 23, 1977.			
March 3	Filed Notice of Appeal			
March 16	The defendant was sentenced in this court Feb. 22, 1977 as a result of conviction by jury to the CAG for imprisonment for a period of six months, with a special parole term of two years, on Count one. Sentence was ordered stayed pending appeal. Defendant was released on own recognizance. The deft. now appears in court and states that he wishes to serve the sentence. The court orders the conditions of his release vacated. Order to be submitted by the USA, Paul V. French. The deft. is directed to report to the office of the U.S. Marshal, Albany, on Monday, March 21 at 10:00 a.m. He is then directed to report to the institution designated by the Bureau of Prisons at his own expense. The appeal of deft. continues. Court orders transcript of these proceedings to be filed with the office of the Clerk.			

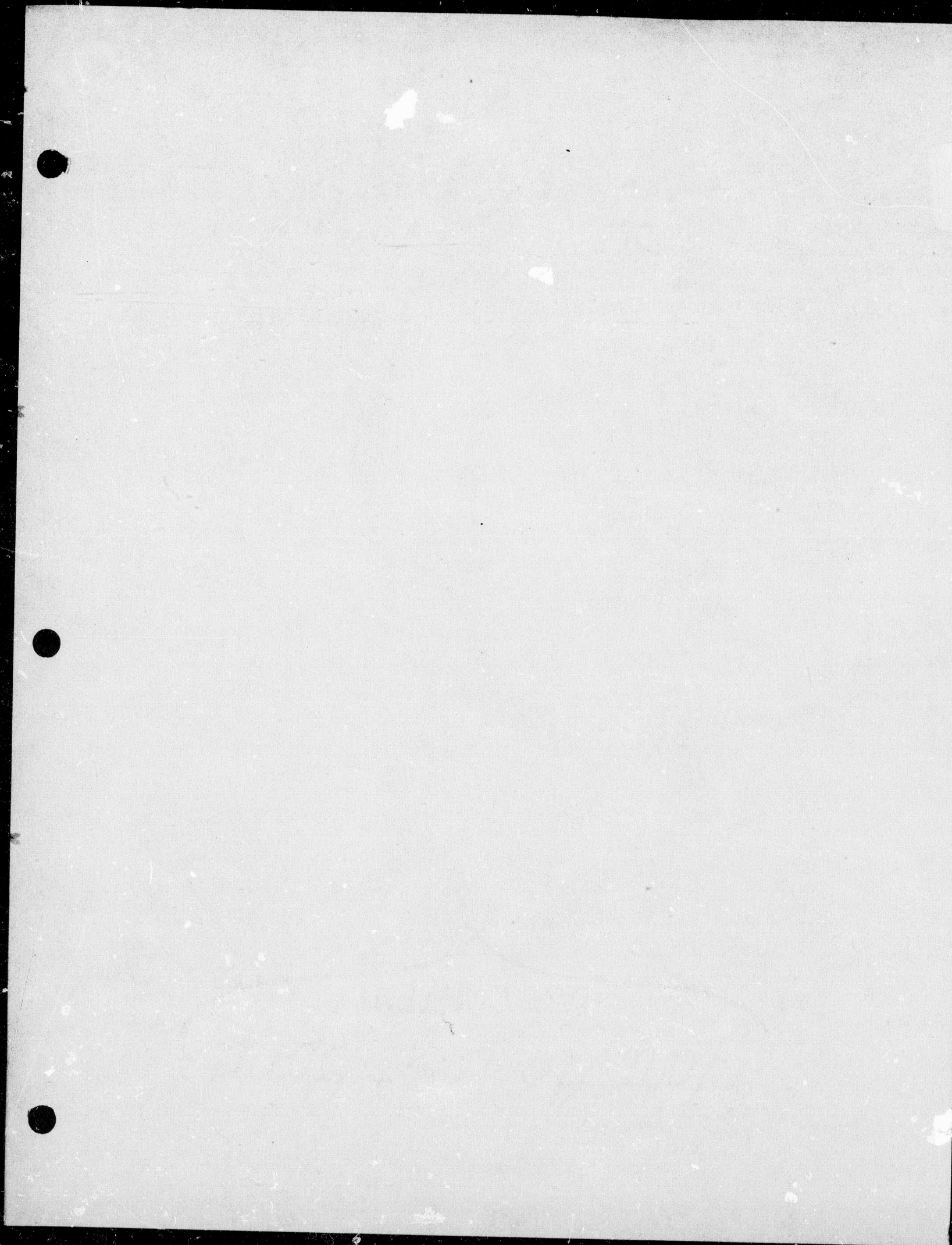
PROCEEDINGS (continued)

V. EXCLUDABLE DELAY

(Document No.)

(a) (b) (c) (d)

1977
 March 18 Filed Order signed 3/18/77 by Judge Foley vacating stay of sentence.
 March 21 Filed Voluntary Surrender for Service of Term of Imprisonment, signed 3/21/77.
 Apr. 6 Filed Commitment executed 3/25/77 to Allenwood Federal Prison Camp at Montgomery, Penn.
 April 7 Filed copy of scheduling order for appeal.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

76 CR
INDICTMENT

Cr. 76-CR- 12

KEVIN T. COONEY, HAROLD J. LEVY, JR.,
CHRISTINE H. COONEY, SANDRA BROOKS, a/k/a
SANDRA BROOKS LEVY, WILLIAM KATZ,
JOHN LEFEBVRE, ELLEN KAPLAN, SANDRA L.
HUNT, MARC COHEN, BRUCE KAY, CURTIS PONZI,
JOHN TIBBETTS, MICHAEL P. HAUSER, RALPH
CLICK, ROBERT ROTH, MICHELLE KOVEN,
and CATHI A. HESSION

(VIO: Title 21,
U.S.C.,
Sections 846
and 841(a)(1))

COUNT I

THE GRAND JURY CHARGES:

That from about the month of July, 1972, through the month of June, 1975, at or near Albany, in the State and Northern District of New York, and elsewhere, KEVIN T. COONEY, HAROLD J. LEVY, JR., CHRISTINE H. COONEY, SANDRA BROOKS, a/k/a SANDRA BROOKS LEVY, WILLIAM KATZ, JOHN LEFEBVRE, ELLEN KAPLAN, SANDRA L. HUNT, MARC COHEN, BRUCE KAY, CURTIS PONZI, JOHN TIBBETTS, MICHAEL P. HAUSER, RALPH CLICK, ROBERT ROTH, MICHELLE KOVEN, and CATHI A. HESSION, the defendants herein, and divers other persons whose names are known and unknown to the Grand Jurors, did wilfully, knowingly and unlawfully combine, conspire, confederate, and agree, together and with each other, to commit an offense against the United States, to wit: to violate Title 21, United States Code, Section 841(a)(1).

That the object and purpose of the said unlawful combination, conspiracy and agreement was to wilfully, knowingly, intentionally and unlawfully distribute a Schedule I controlled substance, to wit: quantities of marijuana.

7
That in furtherance of the aforesaid combination, 77
conspiracy and agreement and to effect the objectives thereof
the defendants at the times and places hereinafter named
did do and perform the following overt acts:

OVERT ACTS

1. On or about July 17, 1972, at or near Latham,
in the State and Northern District of New York, MARC COHEN, a
defendant herein, delivered to HAROLD J. LEVY, JR., a defendant
herein, approximately 350 pounds of marijuana.

2. On or about April 15, 1973, at or near Latham,
in the State and Northern District of New York, WILLIAM KATZ,
ELLEN KAPLAN, HAROLD J. LEVY, JR., JOHN LEFEBVRE and BRUCE KAY,
defendants herein, possessed with intent to distribute approximately
300 pounds of marijuana.

3. On or about August 6, 1973, BRUCE KAY, a defendant
herein, at or near Crescent, in the State and Northern District
of New York, delivered approximately 300 pounds of marijuana
to HAROLD J. LEVY, JR., WILLIAM KATZ, and others.

4. On or about June 21, 1974, at or near Tucson,
Arizona, KEVIN T. COONEY and CHRISTINE H. COONEY, defendants
herein, caused to be delivered to HAROLD J. LEVY, JR., at or
near Crescent, in the State and Northern District of New York,
approximately 300 pounds of marijuana.

5. On or about November 16, 1974, CHRISTINE H. COONEY
and SANDRA L. HUNT, defendants herein, at or near Crescent, in
the State and Northern District of New York, delivered approximately
400 pounds of marijuana to HAROLD J. LEVY, JR., a defendant herein.

All in violation of Title 21, United States Code,

COUNT II

THE GRAND JURY FURTHER CHARGES:

That on or about the 15th day of April, 1973, at or near Latham, in the State and Northern District of New York, KEVIN T. COONEY, HAROLD J. LEVY, JR., JOHN LEFEBVRE, WILLIAM KATZ, ELLEN KAPLAN, and BRUCE KAY, defendants herein, did wilfully, knowingly, and unlawfully possess with intent to distribute a controlled substance as set forth in Schedule I of Subchapter I of Title 21, United States Code, Chapter 13, to wit: approximately 300 pounds of marijuana.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT III

THE GRAND JURY FURTHER CHARGES:

That on or about August 6, 1973, at or near Latham, in the State and Northern District of New York, HAROLD J. LEVY, JR., WILLIAM KATZ, and BRUCE KAY, defendants herein, did wilfully, knowingly, and unlawfully possess with intent to distribute a controlled substance as set forth in Schedule I of Subchapter I of Title 21, United States Code, Chapter 13, to wit: approximately 300 pounds of marijuana.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT IV

THE GRAND JURY FURTHER CHARGES:

That on or about the 6th day of May, 1974, at or near Crescent, in the State and Northern District of New York, HAROLD J. LEVY, JR., SANDRA L. HUNT, BRUCE KAY, WILLIAM KATZ,

- 4 -

KEVIN T. COONEY, and JOHN LEFEBVRE, defendants herein, did wilfully, knowingly, and unlawfully possess with intent to distribute a controlled substance as set forth in Schedule I of Subchapter I of Title 21, United States Code, Chapter 13, to wit: approximately 800 pounds of marijuana.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT V

THE GRAND JURY FURTHER CHARGES:

That on or about June 21, 1974, at or near Crescent, in the State and Northern District of New York, KEVIN T. COONEY, CHRISTINE H. COONEY, and HAROLD J. LEVY, JR., defendants herein, did wilfully, knowingly, and unlawfully possess with intent to distribute a controlled substance as set forth in Schedule I of Subchapter I of Title 21, United States Code, Chapter 13, to wit: approximately 300 pounds of marijuana.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT VI

THE GRAND JURY FURTHER CHARGES:

That on or about November 16, 1974, at or near Crescent, in the State and Northern District of New York, CHRISTINE H. COONEY, SANDRA L. HUNT, HAROLD J. LEVY, JR., KEVIN T. COONEY, WILLIAM KATZ, and ELLEN KAPLAN, defendants herein, did wilfully, knowingly, and unlawfully possess with intent to distribute a controlled substance as set forth in Schedule I of Subchapter I

In violation of Title 21, United States Code,
Section 841(a)(1).

COUNT VII

THE GRAND JURY FURTHER CHARGES:

That on or about December 20, 1973, at or near Albany,
in the State and Northern District of New York, KEVIN T. COONEY,
a defendant herein, did knowingly, wilfully and unlawfully
distribute a controlled substance as set forth in Schedule I
of Subchapter I of Title 21, United States Code, Chapter 13,
to wit: a quantity of heroin.

In violation of Title 21, United States Code,
Section 841(a)(1).

COUNT VIII

THE GRAND JURY FURTHER CHARGES:

That on or about November 20, 1974, at or near Crescent,
in the State and Northern District of New York, KEVIN T. COONEY,
a defendant herein, did wilfully, knowingly, and unlawfully
possess with intent to distribute a controlled substance as
set forth in Schedule II of Subchapter I of Title 21, United
States Code, Chapter 13, to wit: approximately one-quarter pound
of cocaine.

In violation of Title 21, United States Code,
Section 841(a)(1).

COUNT IX

THE GRAND JURY FURTHER CHARGES:

That on or about May 29, 1974, at or near Albany,
in the State and Northern District of New York, CHRISTINE H.
COONEY, a defendant herein, did wilfully, knowingly, and unlawfully

distribute a controlled substance as set forth in Schedule I of Subchapter I of Title 21, United States Code, Chapter 13, to wit: a quantity of heroin.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT X

THE GRAND JURY FURTHER CHARGES:

That on or about September 15, 1974, at or near Albany, in the State and Northern District of New York, JOHN LEFEBVRE, a defendant herein, did knowingly, wilfully and unlawfully distribute a controlled substance as set forth in Schedule I of Subchapter I of Title 21, United States Code, Chapter 13, to wit: a quantity of heroin.

In violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL

Michael P. Rotunda

FOREMAN

James M. Sullivan, Jr.
UNITED STATES ATTORNEY

1 instructions and we will see what happens.

2 MR. LOMBARDINO: All right, your Honor.

3 THE COURT: We just cannot do business
4 this way in the courts, as far as I am concerned, to
5 have something come up the next morning after
6 consultation has been had and a decision is made
7 previous to the organizing of the instructions.

8 MR. RYAN: I would like to mark the
9 modified indictment as a defense exhibit, if I may,
10 as part of the record.

11 THE COURT: So bring the jury in. We
12 will start. It is almost ten o'clock.

13 (Jury enters Courtroom).

14 THE COURT: Good morning, ladies and
15 gentlemen. I guess we all know it is a bitter cold
16 morning, but I am very pleased that all your cars
17 could start and not being frozen up, and you could all
18 be here.

19 Before I start my instructions, I just
20 want to thank you very much and I am sure that I
21 express the feeling of the attorneys and the four
22 defendants who are here on trial, the prosecutor, Mr.
23 Dreyer, for the attention and interest that you have
24 exhibited during this case. Now, to -- now the trial
25 has lasted over a three-week period. I believe it

1 started on December the 1st. Unfortunately there
2 were several days in which other court commitments
3 would not allow the conduct of the trial, but that is
4 part of our problem here in the Northern District of
5 New York with only two district judges covering 29
6 counties with three million population. But many of
7 you come from long distances, and the travel at this
8 time of the year is difficult so this court is very
9 appreciative of the punctuality you showed, your
10 availability when you are called upon to be present
11 to come into court.

12 Now, I can tell you, ladies and
13 gentlemen, and I have instructed juries over many
14 years, at one time we called them charges, I like the
15 term instructions. I can tell you that justice is
16 best dispensed in a calm, patient, dispassionate
17 atmosphere. And that is the kind of attitude you
18 should keep with each other when you retire to our
19 jury room for deliberations in this case. I did tell
20 you, when I first examined you as prospective jurors,
21 that a criminal prosecution is always very important.
22 It is important to the Government and is equally
23 important to the four defendants on trial before us.

24 In the beginning of course you, and I
25 was not too much acquainted with many of the details

1 of the case as they were brought out by these
2 competent, experienced lawyers. But now I know that
3 you sense you are responsible, and you also have a
4 much greater familiarity with the defendants involved
5 and their attorneys, and with the type of prosecution
6 we have before us. I am sure by this time you can
7 identify the defendants as they sit at their counsel
8 table with the attorneys. We have Bruce Kay, Kevin
9 Cooney, Harold Levy and John Lefebvre. The reason
10 why I emphasize their names and their place in the
11 Courtroom is that they have to be treated in this
12 case as individuals. Keep them separate during your
13 deliberations. When you canvass the evidence, and you
14 have to canvass it all, relate it to each of the
15 particular defendants, applying the rules of law that
16 I am going to discuss with you.

17 We, we pride ourselves in courts of
18 law, and it is a fine system, that your decision of
19 guilty or not guilty, guilt or innocence, is to be
20 based solely upon the evidence that was produced in
21 this Courtroom and the exhibits that were received
22 in evidence during the trial. In my instructions,
23 and they are lengthy because they cover many important
24 legal principles, I did not make them up last night
25 when I was organizing my charge, I take them from

1 settled, imbedded principles of law that have been
2 part of our system and have been handed down
3 legislatively or by our higher appellate courts. But
4 you must realize that these principles that I am
5 going to talk to you about are important. I try to
6 condense my instructions in this type of case. It is
7 difficult. But after I have finished these
8 instructions, it will be then your serious obligation
9 and responsibility to decide, on the evidence alone as
10 developed in this Courtroom, whether or not each or
11 some or any of these defendants are guilty of the
12 crime charged in this Count 1 of this indictment.

13 Your verdict, and I must remind you
14 in the beginning, must be unanimous as to each
15 defendant on this Count 1, this charge, guilty or
16 not guilty. You cannot have any lesser number than
17 12 agreeing either way. I am not going to talk too
18 much to you about the facts because we had the
19 advantage yesterday and I think there was six hours
20 of closing arguments. We have about as much a
21 detailed presentation by experienced lawyers of the
22 factual situation as can be presented during any
23 trial. The attorneys, of course, are advocates.
24 They are here for their side of the prosecution. They
25 gave you their versions, they gave you the inferences

1 that they want you to draw. The Government's
2 attorneys did the same thing during his closing
3 argument. But, ladies and gentlemen, finally it will
4 be for you to weigh the evidence and when I say
5 "weigh the evidence," I mean all of it, not just
6 parts of it. Canvass it all and decide from the
7 evidence the issue we have before us as to each of
8 these defendants on trial.

9 I can tell you in the beginning, and I
10 will elaborate on it further, that you are what we
11 call the sole triers and judges of the facts of this
12 case. Now, your recollection of the facts governs
13 above the recollection of the attorneys as they state
14 their recollection during their summations, and it
15 even governs above my recollection if I talked about
16 any part of the facts. The facts will be as you
17 remember them, as you call them together in your
18 collective discussions and deliberations. And I can
19 tell you, from my experience, it is remarkable, and I
20 have found it out in many trials, the recollection
21 that your group will have of the testimony, the
22 exhibits that are material and important in the
23 prosecution and defense of this case. It is also your
24 important responsibility and province to decide the
25 credibility of the witnesses. Now, that has been

1 talked about in the closing arguments, but that
2 responsibility is in every lawsuit. Your search is
3 for the truth, and what you determine truth is by
4 listening to witnesses, observing them on the witness
5 stand and deciding what we call credibility. And I
6 am going to talk to you later in quite a detailed
7 fashion about that phase of your jury function. But
8 I can tell you in the beginning, you should weigh the
9 particular witnesses as to the truth of his testimony
10 the same way you would measure up people in your
11 daily lives. The demeanor of the witness, any
12 hesitancy, any interest that was developed during the
13 direct or cross-examination, what is their
14 testimony, reasonably and probably would you accept it
15 as it was given from the witness stand.

16 There are just ordinary tests of life
17 that we use to try to measure up who is telling the
18 truth and who might be mistaken and who might be tell-
19 ing falsehoods. So generally, those are the tests
20 that are going to apply. Now, during the trial, I
21 made various legal rulings. The attorneys here are
22 advocates presenting their positions, vigorously at
23 times, but that is their right, that is what attorneys
24 are in these courts of law for. But any ruling I
25 made, whether it be on sustaining objections,

1 overruling objections, denying motions or anything
2 in that legal regard, are not to be of any of your
3 concern nor are you to draw any inference at all from
4 the rulings that I made on the particular legal
5 problem. As I told you in the case as it proceeded,
6 those decisions are legal ones and the business is
7 only that of the lawyers and myself. So just -- I
8 request, you do not try to draw any feeling from any
9 ruling I made as to my disposition in regard to that
10 particular question or in regard to the overall
11 decision you should make in this case.

12 Now, the attorneys' statements and
13 comments, of course, during the trial and that often
14 happens, are to be disregarded to this extent, that
15 in and of themselves, they are not evidence. Evidence
16 is only what comes from the witness stand. You should,
17 however, give respectful consideration particularly
18 to the closing arguments made by the attorneys. It is
19 for you to judge the worth of those arguments, the
20 validity of the discussion as they talked about the
21 evidence, the points they thought in their favor and
22 the points they thought that were not proven in
23 certain respects.

24 I did say during the trial, of course,
25 that evidence only consists of questions and answers.

1 You have to take it completely. A question is not
2 evidence, you have to have the entire thing, so I
3 emphasize that again, it is the question and answer
4 that constitute evidence. I do want to say, before
5 I go on to the other principles that I have to talk
6 to you about, that we did have the pleasure of having
7 the case presented by attorneys vigorously, but also
8 in a courteous, respectful manner. I appreciate
9 that attitude, and it is an attitude that I have
10 found throughout my entire judicial career. Maybe I
11 have been fortunate because I know there are episodes
12 when that conduct of attorneys is not as good as it
13 was during this trial. So I appreciate that, and I
14 am sure that you ladies and gentlemen do. To get down
15 now to the matters that are of prime importance here,
16 first, of course, the trial was had upon an indictment
17 and that indictment was returned by a grand jury.
18 And I want to stress that this indictment is merely a
19 written accusation. We only have one count before us,
20 four decisions as to each of the four defendants. It
21 is a written accusation of an alleged violation of
22 law, and of course we are in the United States
23 District Court and we deal with a Federal conspiracy
24 charging the violation of the Federal law. This
25 indictment cannot be considered to any extent as

1 evidence for or against the Government. It is a
2 writing, it is nothing more nor less, by a grand jury
3 which contains this charge of conspiracy to violate
4 a law of the United States and the material elements
5 of that charge must be proven beyond a reasonable
6 doubt by the prosecution, the Government, the United
7 States.

8 So I will read the Count 1. I read it
9 to you in the beginning, and I may not have read it
10 completely, I do not recall as far as overt acts are
11 concerned, but I am going to read the indictment as
12 it was filed in this District Court. This is the
13 basis of the charge which you must apply the evidence
14 to, and I tell you that you must apply the law as I
15 instruct you upon it even though you disagree with
16 the law in certain aspects, you have to accept it
17 because otherwise you might have 12 different versions
18 of what the proper law is that should be applied.

19 "Count 1, the grand jury charges that
20 from about the month of July 1972 to the month of
21 June 1975, at or near Albany in the State and Northern
22 District of New York and elsewhere, Kevin T. Cooney,
23 Harold J. Levy, Jr., Christine H. Cooney, Sandra
24 Brooks, also known as Sandra Brooks Levy, William
25 Katz, John Lefebvre, Ellen Kaplan, Sandra L. Hunt,

1 Marc Cohen, Bruce Kay, Curtis Ponzi, John Tibbetts,
2 Michael P. Hauser, Ralph Click, Robert Roth, Michele
3 Koven and Kathi Hesson, the defendants herein, and
4 diverse other persons whose names are known and
5 unknown to the grand jurors" -- here is the heart of
6 the conspiracy charge -- "did wilfully, knowingly
7 and unlawfully combine, conspire, confederate and
8 agree together and with each other to commit an
9 offense against The United States, to wit: To
10 violate Title 21 United States Code, Section 841,
11 (A) (1)." Now, that section states that, 841, the
12 conspiracy is charged that they conspired to violate
13 that section. It states, and I will just put it
14 in my own words, that it shall be unlawful for any
15 person to knowingly or intentionally distribute a
16 controlled substance. The indictment continues
17 that, "The object and purpose of the said unlawful
18 combination, conspiracy and agreement was to wil-
19 fully, knowingly, intentionally and unlawfully
20 distribute a Schedule 1 controlled substance, to wit:
21 "Quantities of marijuana."

22 Now, you know from the testimony that
23 we had much discussion, testimony from witnesses
24 about marijuana, The indictment continues that,
25 "In furtherance of the aforesaid combination, conspiracy

1 and agreement and to effect the objectives thereof,
2 the defendants, at the times and places hereinafter
3 named, did do and perform the following overt acts."
4 I am going to read all the overt acts to you that are
5 set forth in this indictment, and as set forth in the
6 indictment as it was drawn after it was returned by
7 a grand jury.

8 "First, on or about July 17, 1972, at
9 or near Latham in the State and Northern District of
10 New York, Marc Cohen, a defendant herein, delivered
11 to Harold J. Levy, Jr. a defendant herein,
12 approximately 350 pounds of marijuana."

13 "Two, overt act" -- and I will talk
14 to you about overt acts in my instructions. "On or
15 about April 15, 1973 at or near Latham in the State
16 and Northern District of New York, William Katz,
17 Ellen Kaplan, Harold J. Levy, Jr., John Lefebvre and
18 Bruce Kay, defendants herein, possessed with intent
19 to distribute approximately 300 pounds of marijuana."

20 "Three, on or about August 6, 1973,
21 Bruce Kay, a defendant herein, at or near Crescent in
22 the State and Northern District of New York,
23 delivered approximately 300 pounds of marijuana to
24 Harold J. Levy, William Katz and others."

25 "Four" -- and these are overt acts

1 set forth that have to be proven by the prosecution.
2 At least one of these acts or one other overt act
3 that puts a conspiracy into what we call "operation"
4 -- "Four, on or about June 21, 1974, at or near
5 Tucson, Arizona, Kevin T. Cooney and Christine
6 Cooney, defendants herein, caused to be delivered to
7 Harold J. Levy, Jr. at or near Crescent in the State
8 and Northern District of New York approximately 300
9 pounds of marijuana."

10 "Five, on or about November 16, 1974,
11 Christine H. Cooney and Sandra L. Hunt, defendants
12 herein, at or near Crescent in the State and Northern
13 District of New York, delivered approximately 400
14 pounds of marijuana to Harold J. Levy, Jr., a
15 defendant herein."

16 Now, I have read those overt acts to
17 you. If they are not proven to your satisfaction
18 beyond a reasonable doubt, any or all of them, then
19 just disregard them, the Government has not carried
20 its burden of proving the overt acts beyond a
21 reasonable doubt. I am going to talk to you now about
22 the principles of conspiracy, and of course I have
23 read all those names.

24 We have four defendants on trial before
25 us. Keep your mind focussed upon the four defendants,

1 the names that I read, of course, are part of this
2 indictment and you can take the testimony, canvass
3 it and it is for you to decide what relationship they
4 bear on the issues that we have before us concerning
5 the guilt or innocence of these four defendants, Kay,
6 Cooney, Levy and Lefebvre.

7 Now, this conspiracy charge, in Count
8 1, and it is a conspiracy charge, is quite well known
9 in the Federal system. A conspiracy to do it is the
10 offense. And it is based upon a Federal statute which
11 says this, that, "If two or more persons conspire to
12 commit any offense against the United States and one
13 or more such persons do any act to effect the object
14 of the conspiracy, each is then guilty of a crime.
15 It must be made to appear from the evidence before
16 any, some or all of these defendants or any one of
17 them can be convicted, that he was a party to the
18 conspiracy, an unlawful agreement charged, that he
19 continued to be such up to the time that an overt
20 act was committed.

21 Now, the mere fact that a defendant
22 named may have engaged in the performance of any of
23 the acts charged in the indictment as overt acts would
24 not authorize a conviction by reason of that fact
25 alone. Because it is necessary to show, the Government

1 must show that such defendant was a party to the
2 conspiracy before his guilt of the offense is made
3 out. When a conspiracy is in operation, a person
4 joining it at any time thereafter assumes responsibil-
5 ity for all that was previously done by any party
6 thereto provided only that the new party has
7 knowledge of the fact that such a conspiracy is in
8 operation and he joins such conspiracy knowingly. All
9 the conspirators need not have originally conceived
10 the conspiracy or participated in its inception.
11 Those who come in later with knowledge of the aims
12 and purposes of the conspiracy and cooperate in a
13 common effort to attain the unlawful results becomes
14 parties thereto.

15 I instruct you, ladies and gentlemen,
16 that a conspiracy is not ended as long as the evidence
17 shows an intention to continue it. A conspiracy is
18 defined as a combination of two or more persons by
19 concerted action to accomplish a criminal or unlawful
20 purpose or some purpose not in its unlawful or
21 criminal -- by criminal or unlawful means. The gist
22 of the offense is the unlawful combination or agree-
23 ment to violate the Federal Law.

24 Now, Mr. Justice Holmes said, many
25 years ago in his colorful fashion, a conspiracy is a

1 partnership in criminal purposes. It is not necessary,
2 in order to constitute a conspiracy, that two or more
3 persons should meet together, enter into an explicit
4 or formal agreement for an unlawful scheme or that
5 they should directly, by words or in writing, state
6 what the unlawful scheme was to be and the details of
7 the plan or means by which the unlawful scheme was to
8 be made effective. It is sufficient, ladies and
9 gentlemen, that -- if two or more persons, in any
10 manner or through any contrivance, impliedly or
11 tacitly, come to a mutual understanding to accomplish
12 a common and unlawful design, knowing its object.
13 Persons may be guilty of being parties to a conspiracy
14 though the objects of the conspiracy were never
15 accomplished, but on the other hand, proof concerning
16 the objects of a conspiracy is the most persuasive
17 evidence of the existence of the conspiracy itself.

18 The agreement, I tell you, is generally
19 a matter of inference deduced from acts of the persons
20 ~~who are~~ accused if you find them done in pursuance of
21 an apparent criminal purpose. You are further
22 instructed that where several persons are proved,
23 beyond a reasonable doubt, to have combined together,
24 that is what the charge is in this Count 1, for an
25 illegal purpose, any act done or declaration made by

1 one of them during the pendency of the illegal
2 enterprise and in furtherance of the common objects.
3 is not only evidence against himself but but is
4 evidence against the other conspirators who, when the
5 combination is proved, are as much responsible for
6 such declarations and acts as if made and committed
7 by themselves because each is deemed to assent to or
8 command what is done by any other in furtherance of
9 the common objects.

10 Now, that principle come into play
11 when we had testimony, and I talked to you a number of
12 times, that this testimony here is given out of the
13 presence of other defendants. You have to wait now
14 until you are satisfied beyond a reasonable doubt that
15 there was a conspiracy. You have to decide, by the
16 independent evidence as I told you regarding each
17 defendant, whether he knowingly became a member and
18 it is only then, and only then, that this testimony
19 about acts and declarations can be used against all
20 of those whom you find are members of the conspiracy.

21 Now, it is not incumbent upon the
22 prosecution to prove that all of the means set out in
23 the indictment were in fact agreed upon to carry out
24 the conspiracy or that all of them were actually used
25 or put into operation. It is sufficient, if it be

1 established to your satisfaction beyond a reasonable
2 doubt, that one of the overt acts described in the
3 indictment was agreed upon to be used to effect the
4 conspiracy or if you are satisfied beyond a reasonable
5 doubt an overt act not described in the overt acts
6 that I read to you from the indictment did occur in
7 furtherance of the illegal objectives of the
8 conspiracy.

9 So with these principles, and they
10 may sound heavy and complex and I do not like to give
11 you a lot of legal jargon; that is not my style, but
12 I think you can follow them and when you get to these
13 principles, to apply them, the important question you
14 approach is whether the Government, the prosecution,
15 has proven to your satisfaction beyond a reasonable
16 doubt the existence of the conspiracy alleged in the
17 indictment and if such conspiracy did exist, whether
18 each or all or several of the defendants were party
19 to it and whether the defendants, the particular
20 defendants, keep them separate as I said, entered into
21 it with knowledge of its nature and its objects.

22 So it is from the evidence alone, the
23 time period that I gave you running from '72 to '75,
24 it is for you to decide whether the conspiracy first
25 existed. If you find beyond a reasonable doubt it is

1 proven to your satisfaction it did exist, whether any
2 particular defendant is proven by independent evidence
3 that he became a member knowingly of it, and you must
4 do this, of course, as I say again, the membership
5 question that you have independent of the statements
6 and declarations of others. You really have three
7 things that are necessary here. There must be two or
8 more individuals proven to your satisfaction, there
9 must be a tacit understanding as to what they are
10 going to do, and third, some act must be done in
11 furtherance of the purpose to carry out the conspiracy
12 that is charged.

13 I instruct you that a conspiracy, no
14 matter how many or diverse its objects is but one
15 offense, what we have here is a charge of a
16 conspiracy. It is not necessary that all conspirators
17 be acquainted with each other or that they have
18 originally conceived or participated in a conception
19 of the conspiracy, but those who come on later and
20 cooperate in a common effort to obtain the unlawful
21 results become parties thereto and assume responsibil-
22 ity for all that was done before, I charge you,
23 though, a person does not become liable as a
24 conspirator unless he knows of the existence of the
25 conspiracy, agrees to become a party with that

1 knowledge, commits come act in furtherance thereof.
2 I instruct you, because it is important in our system
3 of justice that mere association of a defendant with
4 an alleged conspirator or conspirators, does not
5 establish his participation in a conspiracy if you
6 find one did not exist, nor is knowledge without
7 participation sufficient. That is if somebody knew
8 about it and did nothing to participate or join in it,
9 then the Government has not carried again its burden.
10 A defendant must participate with knowledge at
11 least some of the purposes of the conspiracy and with
12 intent to aid the accomplishments of its ends, and
13 that is a simple, fundamental rule that we have that
14 we do not believe in guilt by association as
15 sufficiently proven in any case that comes in under
16 our criminal justice system.

17 So I told you it is not essential that
18 each conspirator participate in all the activities.
19 A single act may be enough to draw a defendant
20 over the ambit of the conspiracy, provided you
21 are convinced beyond a reasonable doubt that the
22 defendant knew of the conspiracy and associated
23 himself with it.

24 Now, those are abstract declarations
25 in some respect, but they are applied throughout our

1 system federally, and approved for application by
2 jurors like yourselves. So I am sure that you can
3 follow them and I tried to clarify them as best I
4 can, and you have to put them in the context of the
5 case that we have before us, the testimony, the
6 exhibits, what has been proven.

7 I am going to talk to you about credi-
8 bility, a different subject, as I told you in my
9 beginning, credibility is very important and it is for
10 you to decide the credibility of witnesses and in
11 doing that you weigh, that is the word we use, their
12 testimony. So you should consider the relationship of
13 the particular witnesses to the Government or to any
14 of the defendants, the witnesses' bias or interest in
15 the outcome of the case, their manner, their demeanor
16 while testifying, their hesitancy at times, any
17 other things that might impress you. Their intelli-
18 gence, their candor as you observed it, the extent
19 to which the testimony was corroborated or contra-
20 dicted by other credible evidence that you are willing
21 to accept. The inconsistencies within their own
22 testimony and whether or not they have changed their
23 testimony.

24 I instruct you, ladies and gentlemen,
25 if a witness is shown to have knowingly or

1 inadvertently testified incorrectly or falsely
2 concerning any material matter due to the inability
3 to -- of the witness to properly recall the facts,
4 you have a right to dismiss such witness' testimony in
5 all particulars, and you may reject all the testimony
6 of that witness but you also have the right to give
7 it such credibility as you may think it deserves.
8 Our usual instructions, use your judgment and your
9 common sense in weighing the testimony of witnesses.

10 Now, if you believe that a witness has
11 wilfully sworn falsely before us during this trial or
12 at other times with respect to the material elements
13 of the case, you may disregard his testimony before
14 us in whole or in part. If a witness you find has
15 been mistaken, may have lied with respect to part of
16 the testimony and be accurate in other parts, you may
17 accept those parts that you find that are acceptable.

18 So you have quite a free rein to
19 accept what you want out of the parts of the testimony
20 or reject it all. In this case, of course, I must
21 tell you that a conviction may rest upon the testimony
22 of such a witness, an accomplice, as we call them in
23 law, and we have those witnesses before us because
24 they were part, at least they testified they were
25 part of this operation, whether corroborated or not.

1 If the testimony of that witness is found credible
2 and reliable, you should remember, of course, that
3 the testimony of an accomplice, those particular
4 people who testified as the lawyers went over their
5 names in detail, Roth, Cohen, Katz, Camussa, Hauser
6 to some extent, but this testimony, I caution you
7 and emphasize again, must be received by you with
8 caution and weighed with great care. If you believe
9 that a witness has testified wilfully here before us
10 with respect to a material element, as I said, you
11 can just reject all of it or you can accept that part
12 that you think you want to accept as credible.

13 The fact that a witness has been
14 convicted of a crime may be considered by you as
15 evidence of lack of morality which may make it more
16 likely that he will lie on the witness stand. So keep
17 in mind that this testimony, as far as it coming from
18 accomplice and informants, must be scrutinized with
19 care. The fact that a witness committed a felony may
20 show, in your judgment, it is for you to decide, that
21 the defect in character, it may have made him more
22 likely to lie on the witness stand. So it is for you
23 to weigh that factor in his testimony as it was
24 developed and decide what discreditation it may give
25 to the entire part of his testimony. You should keep

1 in mind, and it was developed here, that a witness
2 may testify before us, and it is for you to decide
3 whether that happened or not, to try to court a
4 prosecutor's favor and avoid, to some degree, punish-
5 ment for himself or to testify in return for any
6 advatnages he may receive.

7 So in your search for the truth, and
8 that is your general, overall search, you should
9 weigh carefully the testimony of these witnesses that
10 are characterized as accomplices, their testimony
11 that was given regarding the disposition of indict-
12 ments against them if indicted, the type of agreement
13 they were accorded in the prosecution recommendations
14 regarding sentencing, or other recommendations that
15 favor the pursuit of their eeucational careers or
16 vocations. So I tell you again, ladies and gentlemen,
17 I emphasize it, it is for you to decide from your
18 observation of them, from the testimony in regard to
19 these factors, whether such factors affected their
20 credibility as given during this trial. It is your
21 responsibility to determine whether or not the
22 testimony that was given here in our Courtroom should
23 be accepted by you as true in whole or in part.

24 Keep in mind that the Federal law does
25 not prohibit the use of informers' or alleged

1 accomplices' testimony nor does it prohibit the police
2 or other agents and you heard the testimony in
3 that regard, which witnesses described, whether you
4 approve of the use of such witnesses or of any
5 of the promises or advantages given them should not
6 influence your decision about the guilt or innocence
7 of these four defendants on trial.

8 You should consider these factors
9 wholly from the standpoint of credibility. I instruct
10 you that as to any witness who admitted lying to the
11 grand jury or otherwise in the past, and that was one
12 of the developments in this case, you should consider
13 also that fact if proven to your satisfaction in
14 weighing their testimony and whether you wish to
15 accept or reject it in whole or in part, you may
16 decide, ladies and gentlemen, for example, that an
17 admitted liar is unbelievable or conversely you may
18 accept his testimony, recognizing in life there are
19 persons who have lied in the past but are not
20 incapable of telling the truth in the present.

21 Again, this is for you and for you
22 only to decide. I want to say that the power of
23 sentence in this District Court, as in any Federal
24 district court, is reposed in the district judges and
25 only in the judges. And the United States Attorney,

1 Assistant United States Attorneys have no power what-
2 ever with respect to the sentence. In saying this,
3 however, I do not wish to suggest what weight should
4 be given to the defense argument, that a human being
5 may color his testimony in the hope that some judge
6 may give him recognition for such cooperation if such
7 it can be called. You should consider this matter
8 also in the assessment of the credibility of witnesses
9 and, as you did with other witnesses, you must decide
10 whether these factors colored his testimony or
11 distorted it or whether or not fundamentally was he
12 telling the truth.

13 So this, again, is for you to decide
14 in weighing the testimony of witnesses. As I told
15 you, the testimony of an accomplice, and I have
16 named them and you can decide for yourselves
17 whether or not they came into the picture as
18 accomplices, should be received with caution, but I
19 say again, accomplice is nevertheless a competent
20 witness. The degree of credibility you want to give
21 is solely within your province. We had testimony in
22 the trial about pleas of guilt by other defendants and
23 of course those pleas, no matter how they were brought
24 out on direct or cross-examination, should have no
25 effect one way or the other as to the guilt of any of

1 these four defendants on trial. They are here under
2 their plea of not guilty and that puts in issue all
3 the material allegations in the charges that the
4 Government must prove, as I told you, beyond a
5 reasonable doubt.

6 Now, we have the word "willful,"
7 "knowingly," and of course those words have important
8 significance in our system. They mean things done
9 with a bad purpose, they mean knowledge as distin-
10 guished from carelessness and error. And there is
11 inadvertent error and mistakes, so intent in criminal
12 intent is present in every criminal prosecution. It
13 is a state of mind, it implies a purpose and intention
14 of willfulness. I charge you that it is seldom proven
15 by direct evidence but maybe inferred from the acts of
16 parties or a combination of the acts of parties
17 involved.

18 You and I know we cannot look into the
19 minds of any human being, at least as yet, although we
20 have many other accomplishments, but ordinarily I
21 tell you, you can draw inferences that you think proper
22 from the conduct of the parties involved in particular
23 situations that were testified to. A good definition
24 of "willful" is the doing of an act deliberately and
25 intentionally with knowledge at the time that the

1 conduct was a wrongful act. Now, I am going to talk
2 to you about important principles that apply in this
3 case, apply in every criminal prosecution in the
4 United States, in the Federal courts. There are
5 certain rules that relate to the presumption of
6 innocence and to reasonable doubt, and I am going to
7 talk to you about them. It is your duty to apply the
8 principles that I give you and endeavor to reach your
9 fair judgment and conclusions: A defendants, each of
10 the defendants, take them separately as I said, is
11 presumed to be innocent until the contrary is proved.
12 That presumption of innocence continues with the
13 defendant throughout the trial until his guilt be
14 proven beyond a reasonable doubt. When his guilt is
15 so proven, ladies and gentlemen, the presumption of
16 innocence is overthrown. None of the defendants is
17 called upon to establish his innocence under our law.
18 The burden of proving the guilt of each and every
19 defendant rests upon the prosecution throughout the
20 case. A defendant is entitled to the benefit of a
21 reasonable doubt upon the whole case, upon all the
22 evidence and lack of evidence in the case, and if
23 there be a reasonable doubt upon any material question
24 necessary for conviction of any particular defendant,
25 it must be resolved in his favor. A reasonable doubt

1 is not a mere whim or a guess or a surmise, nor can
2 it be a mere subterfuge to which resort may be had
3 in order to avoid doing a disagreeable thing. It is
4 such a doubt as reasonable men and women like your-
5 selves may entertain after a careful and honest review
6 and consideration of all the evidence in the case.
7 It must be grounded in reason and survive the rest of
8 reasoning. Of course, the Government has the burden
9 to prove the charge, the conspiracy charge, that I
10 read to you, beyond a reasonable doubt, but of course
11 it does not have the burden to prove that charge
12 beyond all doubt, because usually that is a human
13 impossibility.

14 So reasonable doubt, a good definition
15 is a doubt arising from the evidence, lack of
16 evidence after consideration of all of the evidence
17 and cannot be vague, speculative, something, but it
18 must be such a doubt, such a reasonable doubt, as
19 would cause reasonable men and women like yourselves
20 to hesitate to act upon it in matters of importance
21 to yourselves. And that is a good principle to
22 apply and approved as one that should be followed
23 by a jury.

24 Now, in this case, and it happens in
25 both criminal and civil cases, we have circumstantial

1 evidence. And I charge you, instruct you that it may
2 be received and it is entitled to such consideration
3 as you find it deserves, depending upon the inference
4 that you think is necessary and reasonable to draw
5 from such evidence. The classic example, of course,
6 is given in law school. That is when we first hear
7 about it, and the professor tells you that direct
8 evidence is when you are looking out the window and
9 you see it raining. Then you know it is rain. If
10 you are inside and you are busy doing a lot of things
11 and you do not look outside, you go out shortly
12 thereafter sometime and you see the ground wet and
13 so forth, you can make a fair, proper inference that
14 it has rained just recently.

15 So no greater degree of certainty is
16 required when the evidence is circumstantial than when
17 it is direct, for in either case you must be convinced
18 beyond a reasonable doubt of the guilty of each of
19 the defendants. It consists of facts proven from
20 which you are authorized as a jury to infer by
21 process of reasoning, other facts sought to be
22 established as true. When such evidence, I instruct
23 you, ladies and gentlemen, is capable of an inter-
24 pretation which makes it equally as consistent with
25 the innocence of a defendant as with his guilt, that

1 meaning must be ascribed to that which accords to
2 innocence, I instruct you that in considering circum-
3 stantial evidence, you are not limited to drawing only
4 the inference most favorable to the defendant, circum-
5 stantial evidence is not in any different or lower
6 plain than other forms of evidence.

7 I instruct you also that you should
8 only consider, of course, the four defendants on
9 trial. That is what the prosecution is directed at.
10 Your only task is to determine whether or not they are
11 guilty as charged and that such guilt has been proven
12 beyond a reasonable doubt. I instruct you that if the
13 evidence during the trial points to the guilt of any
14 person or persons not named in the indictment and not
15 on trial before us, you are in no sense to consider
16 such evidence except insofar as it bears upon the
17 questions of guilt or innocence of the defendants who
18 are on trial before us.

19 We did have testimony about pleas and
20 -- of-guilt in several instances by defendants who
21 testified and were previously named in the indictment,
22 but I instruct you that these pleas, of course, do
23 not give any rise to any inference as to the guilt of
24 the defendants here on trial. The defendants' guilt
25 or innocence must be determined by you solely on the

1 evidence introduced during this trial without regard
2 to pleas of guilt that might have been entered by
3 other defendants. An important rule of law which you
4 must followe is contained in Section 3481 of Title 18,
5 United States Code and it says this: "A person
6 charged shall at his own request be a competent
7 witness." These are the important words.. "His
8 failure to make such request shall not create any
9 presumption against him."

10 None of the four defendants testified
11 before us and it cannot be held against any of them
12 nor can you draw any inference from such failure.
13 I instruct you as emphatically as I can that you
14 must guide yourselves carefully in your deliberations
15 in respect to this important rule of law because you
16 cannot draw any inference or implication from the
17 failure of the defendants to take the stand or witness
18 stand in their own behalf. I tell you that the law
19 does not compel a defendant to take the witness stand
20 and testify, no presumption of guilt may be raised,
21 no inference of any kind may be drawn from the failure
22 of any of the defendants to take the stand during
23 this trial.

24 Now, we have another important principle
25 of law and we must apply it again to what we have

1 before us, because at times they sound abstract, lots
2 of words, but they fit them to our situation that we
3 have for your decision. We had talked at least in
4 the closing arguments by Mr. Lebetkin and Mr.
5 Lombardino particularly may be referenced by the
6 other two attorneys, but they talked about the
7 absence of certain witnesses, and I am going to charge
8 you in a quite detailed fashion about that question.
9 It is a privilege of either side here, the prosecution
10 or defense, to call every person as a witness who may
11 give material evidence in their favor. And if that
12 particular party, that defendant or the Government,
13 omits to do so, it is a proper subject of remark, it
14 is a circumstance which a jury like yourselves may
15 consider. I instruct you that while this is a
16 privilege, there is no duty in this respect and an
17 omission to call all witnesses within reach does not
18 necessarily imply a design to suppress the truth.
19 The mere omission of a party to call a witness who,
20 at the most, has no other or better knowledge in the
21 matter in dispute than those who are produced and give
22 evidence is not necessarily suspicious. The failure
23 to call witnesses does not create evidence, that
24 should be clear to you because the witness did not
25 come before us to testify. But if either side has

1 evidence within its power and does not produce that
2 evidence, gives no reasonable explanation for such
3 failure to produce, you may take into consideration
4 such failure in weighing the effect of the evidence
5 produced by the other side on that particular issue.
6 Each side in this case has the power of subpoena, the
7 power to subpoena witnesses and for good reason shown,
8 to take depositions of certain witnesses.

9 You may weigh the circumstances concerning
10 the availability of a witness or non-availability
11 of a witness and draw the inference that you think
12 proper to apply in regard to the testimony that was
13 not produced before us. So I instruct you, ladies
14 and gentlemen, that you have the power to draw
15 such inference as you choose to draw when a witness
16 is equally available to both sides and neither
17 party calls him.

18 So we did have the discussion and I
19 think a stipulation about two witnesses being sub-
20 poenaed, Nyer and what is the other name?

21 MR. LEBETKIN: Abbott.

22 THE COURT: Abbott, and of course that
23 is something for the Court to continue with, at least
24 there was no production of the witness and the
25 contention of the defense seems undisputed is that

1 there was an affidavit that those witnesses were
2 served. So the rule is that if a party, either side,
3 we are talking about Government and defense, has
4 evidence within its power to produce witnesses upon
5 whose testimony would clarify the transaction, the
6 fact that he does not do it in your judgment can be
7 used as a presumption that the testimony, if
8 produced, would be unfavorable to that particular
9 side. If a potential witness could have been called by
10 the Government or the defendants and neither side called
11 the witness, then you may have decided its testimony
12 might have been unfavorable either to the Government
13 or to the defendants or to both sides, but on the
14 other hand, it is equally within your province to
15 draw no inference at all from the failure of either
16 side to call a particular witness.

17 Now, ladies and gentlemen, I charge, I
18 instruct you as I rather call them, have been quite
19 length and I have tried to -- I try to refrain from
20 that as much as I can from being too verbose, but I
21 have got to the conclusion at this part of it, and I
22 am not going to tell you that you have an easy case.
23 Some judges tell jurors that, but I think even
24 the simplest case is difficult at times for jurors
25 to decide. Take all the evidence. You heard it

1 carvassed in great detail, the exhibits are here
2 received in evidence. What we do under our system is
3 write a note out telling what particular exhibits you
4 want in your jury room during your deliberations. I
5 ask you and I am confident that you will do this,
6 decide the issues we have here involved in these --
7 involving these four defendants charged with a
8 criminal violation, decide those issues squarely,
9 fairly, impartially as to the four of them, keeping in
10 mind the importance of the case to the Government and
11 to their side, and if you do that, I am sure you will
12 never have any regrets, no matter with your decision
13 might be. Do not, ladies and gentlemen, allow
14 sympathy, passion or prejudice of any kind to
15 influence your deliberations to any extent. Use your
16 intelligence, your judgment and common sense to arrive
17 at a just and true verdict, as you deliberate, listen
18 to the opinions of your fellow jurors as well as to
19 ask for an opportunity to express your own views.

20 You will have a chance, I am sure, that
21 is our system, to speak out and do so with courtesy,
22 respect for the opinions and viewpoints of your fellow
23 jurors. I instruct you, of course, it is important to
24 remember, that you are not to discuss at all or
25 consider the consequences of your verdict. Such

1 punishment or consequence is solely for the Court.

2 I charge you at this stage that if you
3 find the evidence with respect to the defendants not
4 sufficient to prove their guilt as to any, some or
5 all of them, beyond a reasonable doubt, then such
6 defendants or defendants should be found not guilty.
7 So if you find that the law as to any particular
8 defendant has not been violated, you should not
9 hesitate for any reason to render a verdict of not
10 guilty.

11 Equally so, I tell you that on the other
12 hand, if you find, in accordance with these
13 instructions, that the law has been violated by any
14 of the four defendants on trial as charged in this
15 one-count indictment, you should not hesitate to
16 render a verdict of guilty. Again, I remind you that
17 your verdict, guilty or not guilty as to each of the
18 four defendants, that is the way your verdict will be
19 taken from you by the Clerk, must be unanimous, the
20 12 of you must agree.

21 Now, it is the custom in our court, and
22 I think in other courts, they might do it differently,
23 but you should select a foreman from your own group
24 to speak for you and to announce the verdict or come
25 back to court if you have any questions. I know the

1 lawyers did talk to Mr. Chow as if he is already
2 elected foreman, but I will leave that up to the
3 democratic process of selection by the jury. I
4 remind you again that as far as exhibits, and I am
5 sure you will remember them, designate in writing
6 any exhibit that you want in your jury room.

7 So I think we are at the stage that
8 if the lawyers desire, they can so indicate where I
9 would take objections to my main charge, which means
10 I will excuse the jury from the room.

11 MR. RYAN: Can we have a moment on
12 that, Your Honor?

13 THE COURT: All right.

14 MR. RYAN: Judge, we do not want to
15 hold up the process here, but could we have a side
16 bar conversation with the bar?

17 THE COURT: I would rather have you
18 speak out. It is just a matter of letting the jury
19 out for 10 minutes or so.

20 MR. RYAN: It won't take more than 10
21 minutes. It will take five.

22 THE COURT: All right. Do you want me
23 to leave the jury here because I have requests yet
24 to cover and I am going to cover those.

25 MR. RYAN: All right. Then perhaps can

1 we take a five-minute recess. We will bring the
2 jury in and your Honor can include the changes, any
3 changes that may be necessary. Then the jury can take
4 the case.

5 THE COURT: We will take a ten-minute
6 recess now, ladies and gentlemen, we are not finished
7 yet. You should wait before you talk about the case.

8 (Jury leaves Courtroom).

9 THE COURT: We are going to stay in
10 session. I just wanted to note for the record that
11 the failure to call witnesses is an important part of
12 my instructions, and I followed the recent ruling in
13 United States against Erb, E-r-b- and Depoer, D-e-p-
14 o-e-r, decided by the Court of Appeals, Second
15 Circuit, October 1, 1976, Slip Opinion 49 that was
16 written by Judge Feinberg.

17 MR. RYAN: Right, Judge, and I recall
18 the case. I have not read it recently. The objection
19 we have to the charge is that it was given without
20 the additional statements that a defendant does not
21 have to produce any evidence. All the discussion
22 about absent witnesses does not eliminate the duty of
23 the Government to produce evidence to convict the
24 defendants beyond a reasonable doubt and there is no
25 burden even on a defendant to produce evidence, and

1 the impression I got as I sat in the Courtroom and
2 heard the charge given was that giving the charge
3 without the balancing statement that nevertheless a
4 defendant is not required to produce any evidence
5 and it is the burden of the Government to pro
6 guilt beyond a reasonable doubt I think would have
7 put it in a more accurate perspective.to the jury.

8 THE COURT: I am going to charge you
9 request No. 7 which is on that point.

10 MR. RYAN: You have not -- I do not
11 recall whether you have charged that yet.

12 THE COURT: No, I am going to bring
13 them back in and read it to them.

14 MR. RYAN: Well, all right. That is
15 probably why I am objecting, because as I heard the
16 Judge, I know it is accurate as the rule but the only
17 problem I have, that is a jury may say that, "Well,
18 you know, the defendant could have called witnesses
19 and they should have and they did not do it when the
20 rule, as we all know, that a defendant does not have
21 to produce any evidence, so if your Honor is going
22 to go into this, I would ask your Honor to mention,
23 I did tell you about the rules of law on absent
24 witnesses but bear in mind that a defendant is not
25 required to produce any evidence, it is still the

1 Government's burden and as are as any absent witnesses
2 you draw whatever inference you want, but it is still
3 the Government's burden.

4 THE COURT: I am going to let it
5 stand. I think when I talked about reasonable doubt,
6 I went into that, any evidence, lack of evidence.

7 MR. RYAN: Just a moment. I have a
8 little problem with my co-counsel here.

9 THE COURT: You may call attention to something
10 you do not want to call attention to, I do not know.

11 MR. RYAN: So our request is that when
12 you mention the fact that the defendant does not have
13 a burden, that you remind the jury the absent
14 witness charge has something to do with inference
15 that you might draw but still the burden is on the
16 Government. We make that request when you give 7
17 and I take it you are also going to give 8, your
18 Honor, 8.

19 THE COURT: You see, the purpose of
20 these objections, of course, is to point out some-
21 thing that impresses me as being quite substantial
22 and I should try to correct it.

23 MR. RYAN: I know.

24 THE COURT: I am not persuaded on that
25 part. I am going to read No. 7 and No. 8 which is

1 agreed to by Mr. Dreyer and it is quite an unusual
2 instruction to give but I will give it.

3 MR. RYAN: Well, it is in the book, in
4 the law books and it is a charge that has been given
5 many times before.

6 Judge, one problem I had was-- Look,
7 I am going to make my objections, then you fellows
8 make your own objections, all right?

9 MR. LOMBARDINO: Yes.

10 MR. RYAN: I, as I sat here on the
11 conspiracy charge, Judge, you mentioned three times
12 that a defendant who joins a conspiracy becomes
13 responsible for the acts of the others and you
14 mentioned three times that the Government need only
15 show one overt act.

16 Now, the counter fact that I think has
17 been overbalanced is the mere association or mere
18 knowledge is not enough, that was only given once and
19 I was fearful that there was an undue emphasis on
20 the charge concerning a defendant such as like Bruce
21 Kay who may join and then become responsible for
22 others. I just felt that there was an undue emphasis
23 on that. And also twice during the charge you
24 mentioned that a trial is a search for the truth. I
25 do not mind those expressions provided that it is also

1 their duty to weigh all of the evidence and the
2 Government's burdens are to prove the guilt beyond a
3 reasonable doubt, if it is just a search for the
4 truth, they can believe it happened, but they may not
5 be willing to accept the witnesses beyond a reasonable
6 doubt.

7 And then my last observation I want to
8 make on the record is that with respect to a --
9 accomplice testimony, we have a request that says that
10 if you do not believe that accomplice testimony which
11 is unsupported beyond a reasonable doubt, you cannot
12 convict. That is in the credibility charge we have on
13 my third page of request No. 4. You should never
14 convict the defendant upon the unsupported testimony
15 of an alleged accomplice unless you believe that
16 unsupported testimony beyond a reasonable doubt.

17 And what your Honor charged, it was
18 that they would just have to -- they can give it
19 credible belief but that belief has to be the kind of
20 belief that should be convinced beyond a reasonable
21 doubt. Those are my objections.

22 THE COURT: I am going to charge parts
23 of your request No. 4 as I told you. I do not know,
24 is there any paragraph that you can point to?

25 MR. RYAN: Yes, the paragraph on the

1 third page of request No. 4 you have given most of it
2 but you should never convict a defendant upon the
3 unsupported testimony of an alleged accomplice
4 unless you believe --

5 THE COURT: I am going to charge that.

6
7 MR. RYAN: I do not know how much
8 further your Honor intends to go on the charge.

9 THE COURT: Well, my custom has been
10 proved -- approved in the higher courts a number of
11 times. I am going to read the request to charge. I
12 told you I was going to charge, tell them to consider
13 it in the same respect as they would if it were part
14 of my main charge.

15 MR. RYAN: Fine, thank you.

16 THE COURT: But I am not persuaded on
17 your other point, so I am not going to make much
18 change.

19 MR. LOMBARDINO: Your Honor, for the
20 objection on behalf of defendant Cooney, I have no
21 objection to your Honor's charge. However, your
22 Honor, I would ask you to consider, when you read the
23 other charges, your Honor has rightfully charged the
24 jury as to how they should handle the missing
25 witnesses that we made reference to. On the summation,

1 would your Honor also indicate that they have a right
2 to consider evidence of a physical nature that was
3 not produced such as the tape or tapes, which has been
4 alluded to during the time of trial by Special Agent
5 Montagne? Your Honor, I think that is quite
6 significant because it is quite clear from Montagne's
7 testimony that there was a tape recording and the fact
8 that they are not here, they may have been in one case
9 destroyed; at least where he erased it. They have a
10 right to consider that as they would the not calling
11 of a witness. That evidence is just as important as
12 a witness coming into court to testify and the tape
13 was not only unavailable to your Honor but as unavail-
14 able to me and unavailable to the jury.

15 THE COURT: No, I am not inclined to do
16 that. I think it is too particularized, as I said,
17 it gets into details that I try to keep away from and
18 if I get into emphasizing those particular features,
19 as I told you in Chambers, it is like the fifth
20 summation for the defense.

21 MR. LOMBARDINO: Very well.

22 THE COURT: I am inclined to just leave
23 it there generally and I think they have the strenght
24 from your position from the arguments we had yesterday
25 in that regard.

1 MR. LOMBARDINO: Very well. I have
2 no objection to your Honor's stance on that.

3 THE COURT: Mr. Lebetkin?

4 MR. LEBETKIN: Your Honor, I do not
5 know whether or not I did not hear something you said
6 or I misunderstood it, but it may very well be,
7 though, that the jury could have misunderstood it, and
8 that is in referring to the other names in the indict-
9 ment of the people who are not defendants here on
10 trial, I was wondering whether or not your Honor said
11 that you are not to consider those names except
12 insofar as that bears upon the guilty of the
13 defendants on trial, and if I -- if your Honor does
14 not say that --

15 THE COURT: I think I did say something
16 along that line with the meaning that maybe those
17 names came out in testimony and it is for them to
18 weigh what effect they have on this issue as to the
19 guilt of these four or innocence of these four.

20 MR. LEBETKIN: Well, then, then I
21 would have to object to it, Judge, and ask your Honor
22 if he could clear it up somewhat with the jury
23 because they may draw the other inference that those
24 people, that in weighing what those names were doing
25 in the evidence, they may be considering the fact that

1 those people could have pleaded guilty or they --
2 there may have been some other disposition of the case,
3 and that would then bear in a prejudicial manner on
4 the reminaing defendants.

5 THE COURT: I do not know, is there
6 any requests you had that you submitted in regard to
7 reading all the names? I just have these requests
8 that were given to me.

9 MR. LEBETKIN: Well, the fact is this
10 came up yesterday in our discussions. I am well aware
11 of what the discussion was, and I will admit that as
12 far as I am concerned, Judge, I do not speak for
13 anybody else, but I am not perfect and I should have
14 objected on that discussion yesterday. I think it
15 was an oversight because I was taking a much
16 different view of it yesterday than I was taking of it
17 last night when I had time to reflect on it, and I
18 do not think that I saw the harm, and it isn't too
19 late for me to correct my own action in not objecting
20 vigorously and now I am more impressed with my concern
21 insofar as now that I have heard the charge and your
22 Honor takes the position that they should consider
23 the names of those people in the indictment because
24 there are two categories here, they are not just
25 names that were mentioned at the trial. If that was

1 the case, Judge, I would not object, but there is a
2 coincidence of circumstances here that the names
3 mentioned at the trial also happen to be named in the
4 indictment of people not being on trial but related
5 to the defendants.

6 I do not see how the jury could take
7 any other inference from it, they are only human and
8 it would certainly give them--

9 THE COURT: What inference do you
10 think they would draw?

11 MR. LEBETKIN: I think the inference
12 they would draw significantly and I speak with
13 reference to my client, Harold Levy, Jr., is that
14 when he was married to Sandra Brookes Levy, if they
15 find that he is engaged in an illegal activity, then
16 the woman who was his wife and living in that same
17 house was also engaged in that illegal activity
18 because she was indicted for it, and if she was
19 indicted for it and if her name was mentioned at the
20 trial also and she is not sitting at that table, then
21 there is a reason for it, either she pleaded guilty or
22 she ran away and wanted nothing to do with him because
23 he got himself in trouble, whatever it is, Judge, I
24 cannot account for all the explanations that would go
25 through the jurors' mind, but I know that every one of

1 them is bad to my client.

2 THE COURT: Her name was mentioned
3 during the trial?

4 MR. LEBETKIN: If her name was
5 mentioned?

6 THE COURT: Wasn't it mentioned during
7 the trial?

8 MR. LEBETKIN: By Moscovitz.

9 THE COURT: Yes, I think it was
10 mentioned, but I do not foresee all the dire
11 consequences that you foresee.

12 MR. LEBETKIN: We would not even have
13 to know about it if it was not there, that is the
14 point. But the fact that your Honor has made the
15 additional statement only gives them more cause for
16 thinking that maybe it is something for them to
17 consider because they were named in the indictment and
18 you can consider that on the question of the guilt of
19 these defendants.

20 THE COURT: No, I am not going to
21 change it. I will stand on it. I mean, what I did.
22 I worked on it last night and gave it thought and
23 tried to be careful and fair.

24 Mr. Leone?

25 MR. LEONE: I have no objection to

1 charge.

2 THE COURT: I am going to bring back
3 the jury and read your requests and then it is going
4 to be fully submitted.

5 (Jury enters Courtroom).

6 (Requests read).

7 THE COURT: All right, ladies and
8 gentlemen, we have what we call requests to charge
9 by the defense and several requests by the prosecutor
10 and we have conferred about it and I have agreed to
11 instruct you upon some of these requests. They are
12 not too lengthy, and you must consider them in the
13 same respect as though I had delivered them to you
14 in my main charge. They are part of my instructions
15 to be taken in the same sense as though I have
16 included them in my main instructions.

17 Each defendant is -- this is request
18 No. 1 has entered a plea of not guilty to the crimes
19 charged in this case. By pleading not guilty, each
20 defendant denies that he is guilty of the crimes
21 charged and places into issue everything material to
22 a finding of his guilt even in the most patent truths.
23 2, the weight of the evidence is not necessarily
24 determined by the number of witnesses testifying on
25 either side. You should consider all the facts and

1 circumstances in evidence to determine whether the
2 Government has proven each defendants' guilt beyond
3 a reasonable doubt, you cannot count witnesses, we
4 never do that in a courtroom.

5 The fact that witnesses -- this is
6 request 3, Marc Cohen, Robert Roth, William Katz and
7 Michael Hauser have pleaded guilty is no proof what-
8 ever of the guilt of any of these defendants on
9 trial. Their pleas may not be used by you in any
10 way as evidence against or to create any unfavorable
11 inference against any of the defendants on trial.
12 That is along the same line as the thought I expressed
13 in my main instructions.

14 Request No. 4, this is on credibility.
15 And I did talk to you in detail, but I will read
16 this request. A difficult aspect of your duty is to
17 determine the credibility of the witnesses before you
18 and to weigh their testimony. In weighing their
19 testimony, you may consider the relationship of the
20 witnesses to the Government or to the defendant, the
21 witnesses' bias or interest in the outcome of the
22 case, their manner while testifying, their candor and
23 intelligence as you observed it, the extent to which
24 they have been corroborated or contradicted by other
25 credible evidence, inconsistencies within their own

1 testimony and whether they have changed their
2 testimony. If you believe, and I did talk about these
3 same type of instructions that you must follow, if
4 you believe a witness is -- has wilfully sworn falsely
5 before, you or at other times with respect to a
6 material element of the case, you have a right to
7 distrust such witnesses' testimony in whole or in
8 part. But, of course, a witness may have been
9 mistaken or may have lied with respect to part of his
10 or her testimony and be accurate with respect to other
11 parts.

12 I instruct you, out of this request,
13 you should never convict a defendant upon the
14 unsupported testimony of an alleged accomplice unless
15 you believe that unsupported testimony beyond a
16 reasonable doubt. If you believe that any of the
17 witnesses in this case were induced to testify by any
18 promise of immunity or any hope was held out that they
19 would be rewarded or in any way benefit if they
20 implicate the defendants in the crime charged herein or
21 if they believe they would so benefit even if no such
22 promises were made, then you may consider the fact and
23 that is those facts in determining what weight should
24 be given to such witnesses' testimony.

25 Request 5, if you find that a particular

1 defendant is a member of another conspiracy, not
2 the one charged in the indictment, then you must acquit
3 that defendant. In other words, to find the
4 defendant guilty, we only have four of them here,
5 you must find that he was a member of the conspiracy
6 charged in the indictment beyond a reasonable doubt
7 and not some other conspiracy.

8 No. 7, the law does not compel a
9 defendant in a criminal case to take the witness
10 stand and testify and no presumption of guilt may be
11 raised and no inference of any kind may be drawn from
12 the failure of a defendant to testify. As stated,
13 and I think that I at least gave that inference to
14 you in my instructions, the law never imposes upon
15 the defendant in a criminal case the burden or duty
16 of calling any witnesses or producing any evidence.

17 No. 8, bear in mind, this is something
18 I told you, it would be a violation of your sworn
19 duty to base a verdict upon anything but evidence in
20 the case, if the accused, that means any of the four
21 defendants, if proven guilty, say so; if not proven
22 guilty, say so. Remember at all times that a
23 defendant is entitled to acquittal if any
24 reasonable doubt remains in your mind. Remember also
25 that the question before you can never be will the

1 Government win or lose the case. The Government
2 always wins when justice is done, regardless of
3 whether the verdict be guilty or not guilty.

4 I will charge these requests of the
5 prosecution. It is in line with what I previously
6 talked to you about. The Government does not need to
7 show that an alleged conspirator knew all the details
8 of the conspiracy or that he knew all of the other
9 conspirators. I charge you this other request, in
10 arriving at your verdict as to the guilt or innocence
11 of the defendants, you should also consider evidence
12 of overt acts in the furtherance of the conspiracy
13 even if the overt acts are not alleged in the indict-
14 ment. That means, again, ladies and gentlemen, you
15 have to canvass all the evidence in regard to these
16 elements, that must be established beyond a reasonable
17 doubt or by independent evidence as to membership and
18 so forth.

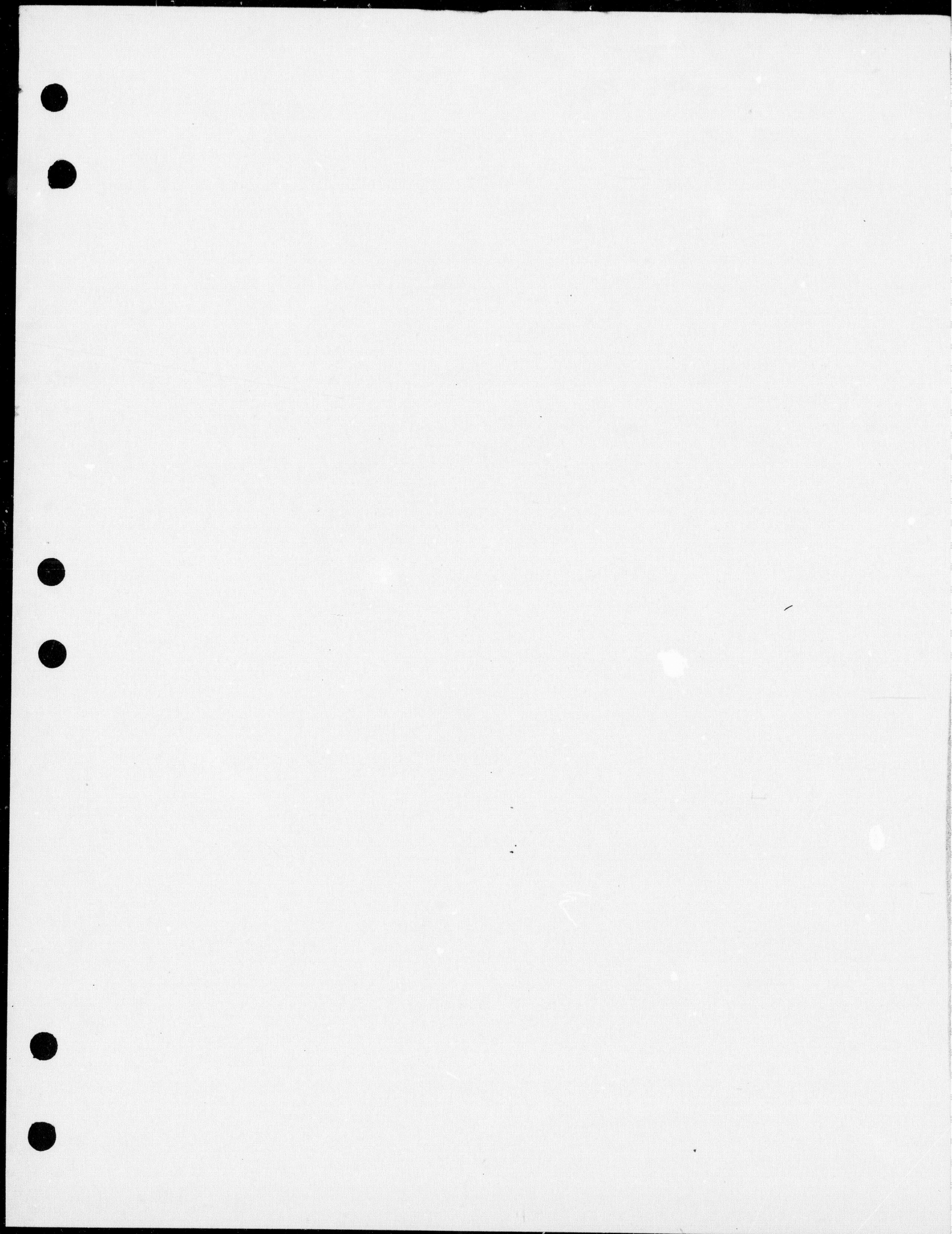
19 So I have read the requests for
20 charge and I will just reiterate what I said before.
21 Take the case, decide it fairly, do not allow sympathy,
22 prejudice or any of those elements to enter your jury
23 room. You have no regard at all for the consequences
24 of your verdict. If you find the Government has proven
25 its case against any defendant beyond a reasonable

1 doubt, do not hesitate to bring in a verdict of
2 guilty. On the other hand, if you find that the
3 Government has failed in this burden, applying these
4 principles of law that I have given you, your verdict
5 then, of course, should be not guilty as to that
6 particular defendant.

7 So I am ready now to submit the case.
8 As I reminded you, any exhibits you want that were
9 received, write out your note. I do think the marshal
10 has made arrangements to have lunch available for you
11 in an hour or so anyway, and the time has now come
12 when I have to excuse Kathleen Connell and Joanne Klein
13 because from now on you cannot participate in the
14 deliberations of the 12 people, but I do want to
15 thank both of you for coming all these days and also
16 for the attention you paid to the testimony during
17 the trial. I am going to excuse you. We expect to
18 go back to the jury trials again. This is quite an
19 extended session. I am having here January 4, so you
20 are excused.

21 THE CLERK: 9:30, January 4.

22 THE COURT: You are asked to come back
23 that is Tuesday, January the 4th, because on Monday, I
24 again have one of my inevitable motion days that I
25 cannot avoid, so you may get your clothing, and thank



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

76-CR-12

KEVIN T. COONEY, HAROLD J. LEVY, JR.,
CHRISTINE H. COONEY, SANDRA BROOKS, a/k/a
SANDRA BROOKS LEVY, WILLIAM KATZ, JOHN
LE FEBVRE, ELLEN KAPLAN, SANDRA L. HUNT,
MARC COHEN, BRUCE KAY, CURTIS PONZI, JOHN
TIBBETTS, MICHAEL P. HAUSER, RALPH CLICK,
ROBERT ROTH, MICHELLE KOVEN, and CATHI A.
HESSION

APPEARANCES:

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JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

The indictment herein in Count I charged seventeen named persons with conspiracy to distribute quantities of marijuana in violation of Title 21 United States Code, Section 841(a)(1). Of the seventeen named, four defendants, Cooney, Levy, LeFebvre and Kay went to jury trial on Count I.

The case was submitted to the jury on December 22, 1976, after the instructions ended at 11:05 a.m. Their deliberations continued

ORDER

throughout the day and a verdict of guilty for the four defendants was returned at 11:35 p.m. that night. During the individual polling of the jury, there was a comment by Juror No. 10, Mrs. Judith Earl, concerning her state of mind of the guilt of defendant Kay, and also there developed during this individual polling, comments concerning the taking of notes during the trial by Juror No. 1, Charles Chow, and the use of his personal handwritten notes during the jury deliberations. After these incidents and interrogation by me of the two jurors about them, I allowed and directed the verdicts of guilty to stand and to be so recorded. Immediately thereafter, at my request, motions by the defense attorneys were made on behalf of each defendant to set aside the verdicts and for entry of judgment of acquittal, but denied from the Bench. Fed. R. Crim. P. 29(c).

To be discussed herein and decided are now present two formal, written motions to set aside the verdicts and grant a new trial under Fed. R. Crim. P. 33. One motion is in behalf of defendant Kay, based upon the comments of Juror Earl in regard to her verdict of guilty of Bruce Kay when polled individually; and the other motion is jointly for the other three defendants, requesting the verdicts to be set aside and for a new trial based upon the same question, and also upon the note-taking by Juror Chow. In the submissions on the motions, the attorneys had a transcript made that covers the incidents only from the time request was made for individual polling of the jury after the verdicts of guilty of the four defendants had been read by the Foreman for each one in open court, with the clerk in each instance inquiring collectively, "And so say you all." For purposes of this discussion, I have had transcribed and shall file with the Clerk of the Court, the minutes that cover the objections and discussion after my instructions, the caution to Juror Chow early in the trial on December 2, 1976, by me, in the presence of all other jurors in the jury box about note-taking, and the statements

and comments made when the jurors returned to open court for reading of testimony on a substantial number of occasions. These minutes to my mind are very pertinent and illuminating on the questions presented.

Each defendant was individually represented by experienced counsel who were vigorous in their advocacy; several being relentless in their prolonged and pounding cross-examination of government witnesses. I allowed extensive cross-examination of the government witnesses because it was evident and agreed that credibility of these witnesses, being in the category of accomplices for the most part, was an important issue in the case. Of the other named defendants in the indictment, several had dismissals or received extremely light sentences under 21 U.S.C. §841(b) and provisions of the Youth Corrections Act. There was no question in my mind that unrestricted cross-examination should be allowed to fully develop for the defense, and for careful jury consideration, any interest or treatment of these accomplice witnesses in relation to possible motivation for such witnesses to falsify their testimony. The trial lasted for approximately three weeks and, as previously noted, on the night of the first day of their deliberation, the jury returned their verdicts literally at the eleventh hour of that day, 11:35 p.m., December 22, 1976.

Following the usual procedure, the verdicts of the jury, covering each defendant separately, were requested by the courtroom Deputy Clerk, and upon the clerk's requesting the verdict for each defendant after naming him, Foreman Chow, reading from a note, announced guilty until all four defendants by separate requests by the clerk for each defendant were covered. There was no disagreement orally with each announcement of the verdict of guilty nor any outward sign of any disagreement by any juror in the jury box. All defense counsel then requested individual polling of the jury pursuant to Fed. R. Crim. P. 31(d).

In the polling for each of the four defendants, in the order agreed upon by all counsel, guilty responses were given by all jurors for three defendants, LeFebvre, Levy and Cooney, until comment was made by Juror No. 10, Mrs. Judith Earl, in polling her individually, in regard to her verdict concerning the guilt of defendant Kay. It was then in this last polling concerning defendant Kay, that she made the response that caused further inquiry by me as to her state of mind concerning the guilt of defendant Kay, and to find out in view of her comments whether the verdict should be accepted and recorded as a unanimous verdict of the twelve jurors required to find defendant Kay guilty as charged. Her first response to the poll by the courtroom Deputy Clerk with regard to defendant Kay was:

I would like to say not sure, but I say
guilty because of the others -- realizing
that all --

Proceeding of December 22, 1976 at 11:35
p.m., at p. 10.

This comment, and the colloquy which I found it necessary to pursue thereafter, has spawned the two separate motions to be discussed herein. It should be noted again that defendant Kay, in his motion, relies solely upon this incident that happened with Juror No. 10, while the other three defendants not only rely upon this question, but further rely upon alleged impropriety in the note-taking by Juror Chow and the use of such notes during the jury deliberations. Both of the instant motions, pursuant to Fed. R. Crim. P. 33, consist of the notice of motion, a single affidavit of counsel, a legal memorandum and the selectively limited transcript of the jury polling. Counsel for defendant Kay applied for, was granted and gave oral argument on January 26, 1977, but the joint motion on behalf of the other three defendants was simply submitted for decision on the papers.

By characterizing Juror No. 10, Judith Earl, in one submission on his motion as "not a confused juror . . . [but rather] an active juror . . . [who] expressed herself clearly . . ." [Defendant Kay's

Memorandum of Law, filed January 10, 1977] and in another as "a frightened, scared woman" [Affidavit of Counsel, attached to Notice of Motion, filed January 10, 1977], counsel for defendant Kay contends that her comments must be considered as expressions of reasonable doubt as to Kay's guilt which, it is argued respectfully, she was coerced into by pressures from the Court's questioning and by the presence of the other members in the jury box. Also, it is suggested that she was personally fatigued from the late hour of the proceedings at the time the verdict was taken in open court after the day long deliberations.

Defendants Cooney, Levy and LeFebvre view the comments and answers by Juror No. 10 to my questions as indicating her general confusion concerning the conspiracy portions of the jury charge. None of the counsel for these defendants made any specific objection to the charge in this respect. They also contend, in argument which is difficult for me to accept, that Juror No. 10's equivocation as to the guilt of defendant Kay should be read to undermine her unequivocal vote of guilty on the verdicts rendered against defendants Cooney, Levy and LeFebvre whom they represented. The argument seems to be one that could only be based upon a theory of osmosis because to me the doubt that she willingly expressed about Kay, I believe reinforces the conclusion that she had no doubt of the guilt of the other three defendants. Additionally, although attorneys for these defendants did not object to my allowance of jury note-taking with my cautions, particularly to Juror No. 1, Mr. Chow, who was selected as Foreman and whose note-taking was visible to all, they now contend that a post-verdict hearing should be held to determine if the Foreman made improper use of his personal notes during the jury deliberations. Counsel for defendant Kay, as pointed out in his motion, does not raise this issue in any way in his separate motion for a new trial and, indeed, stated at his oral argument that this note-taking was discretionary with the Court under ruling of the Court of

Appeals, Second Circuit.

Blackstone said that trial by jury is the glory of the law. The jury system has been long accepted as the best way, unless waived, to dispense justice fairly in the American system of justice. This jury deliberation process by laymen is particularly important and desired in criminal prosecutions. The responsibility of determining guilt or innocence, always a difficult assignment, is placed on ordinary citizens who must grapple with complex legal principles and reconstruct facts and search for the truth from evaluation of the testimony of many witnesses with the right to decide the part that should be accepted as reliable and supported by credible evidence. Of course, the most serious aspect of this process is when the twelve individual persons must deliberate for the first time as a group and must then speak with one voice. The give and take and the compromise in jury deliberations which such a process necessarily involves was well described by [former] Chief Judge Lumbard in Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1033 (2d Cir. 1971) (concurring opinion). His common sense view of the jury functioning as a reasonable group of men and women who are willing to change their views is the only way such a decision making process could work effectively. The judge described succinctly what jury deliberation is all about.

After duly inquiring as to the meaning and import of this comment by Juror No. 10, and after having observed her other behavior during the course of the trial and jury deliberations, it is my firm judgment that there is no reason to doubt that she intended to and did record a guilty verdict with respect to defendant Kay which was voluntary and free from coercion and from reasonable doubt. See United States v. Brooks, 420 F.2d 1350, 1351 (D.C. Cir. 1969). Based on this finding, there could be no basis for any inference of confusion regarding Juror's No. 10 unequivocal vote of guilty on the verdicts against Cooney, Levy and LeFebvre.

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The occurrence where a juror does not express her vote in precise legal parlance or in the form requested by the courtroom clerk during polling is not unknown in the federal courts. Similar incidents have been presented to the various courts of appeals for review and their decisions can be divided into two categories where the intent and result of the trial judge's colloquy was to clarify or to translate the express vote of a juror into non-ambiguous legal terms and the other category where colloquy is deemed coercive or was done in such fashion to cause the hesitant juror to actually vote in open court. Amos v. United States, 496 F.2d 1269, 1273 (8th Cir. 1974), cert. den. 419 U.S. 896 (1974).

The situation which developed here in the colloquy with Juror No. 10 bears, in my opinion, after review of the transcript, no resemblance to those cases which defendants rely upon as indicating coercion. To my mind, after my questioning at the actual scene, I was satisfied from her answers that Juror No. 10, Mrs. Judith Earl, had reached a guilty verdict as was indicated by no disagreement on her part orally or by physical demonstration when the verdict was taken collectively and read out by the Foreman of the jury. It was evident from the manner in which the jury came into the courtroom after informing the Deputy Marshal they had reached a verdict on all defendants that the guilty verdict of defendant Kay was not one formed in open court by Juror No. 10 nor a forced one, compelled to be given for the first time in open court, see United States v. Sexton, 456 F.2d 961 (5th Cir. 1972); nor was this a situation where a juror was given the sole alternative of voting "yes" or "no" without allowing full expression, explanation or further qualification of their vote. See United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970). There is unquestionably an affirmative obligation on the trial court to clear up any apparent confusion in instances of this kind and to determine a juror's vote or expressions in a poll when it is not articulated in "the precise forms submitted to it under

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court's instructions", or when it is not strictly in the parlance of the courtroom. See Cook v. United States, 379 F.2d 966, 971 (5th Cir. 1967). There is no verdict if there is any uncertainty concerning unanimity of the twelve, and it has been held as error for a trial court to ignore, prohibit, or fail to clarify such expressions made by jurors during the polling procedure. United States v. Edwards, 496 F.2d 1362; see Rogers v. United States, 422 U.S. 35 (1975); Jones v. Estelle, 538 F.2d 651 (5th Cir. 1976) (per curiam); United States v. Mathis, 535 F.2d 1303, 1307 (D.C. Cir. 1976); 8A Moore's Federal Practice - Criminal Rules ¶31.07. The court in Edwards remarked, along lines similar to Chief Judge Lumbard's view, that:

Jurors are laymen, unskilled in the fine distinctions of the law. When a juror states that he has doubts, the trial judge should be alerted to the probability that there may not be unanimity in the verdict.

Id., 496 F.2d at 1367.

When a response to a jury poll is given as guilty with qualification, the trial judge is put in the delicate position of determining whether the vote is in reality one of guilty with a level of certainty as required beyond a reasonable doubt or whether it is something less certain which requires further deliberations by the jury pursuant to Fed. R. Crim. Pro. 31(d). This task must be accomplished without delving too deeply into the motivation and rationale for the vote. United States v. Lockhart, 366 F. Supp. 843, 849 (E.D. Pa. 1973), affirmed without opinion, 495 F.2d 1369 (3rd Cir. 1974). There are three areas of determination in such an event: First, was the juror's vote truly his own and free from any coercion? United States v. Duke, 527 F.2d 386, 394 (5th Cir. 1976), cert. denied, ____ U.S. ____, 44 U.S. Law Week 3738 (June 21, 1976); Jackson v. United States, 386 F.2d 641 (D.C. Cir. 1967) (per curiam). Secondly, the court must determine whether there is any confusion about the court procedure in fully understanding the charge, the polling procedure of the jury

or the meaning of the juror's response. United States v. Brooks, supra, 420 F.2d at 1351; Williams and Coleman v. United States, 419 F.2d 740 (D.C. Cir. 1969) (en banc). Finally, it must be determined whether the vote itself is for guilt beyond a reasonable doubt, or whether the juror's expressions indicated a lesser degree of certainty which necessitates further jury deliberations under Fed. R. Crim. Pro. 31(d).

As the record shows, after the culmination of my direct questioning, in my judgment, Juror No. 10 expressly indicated overall, conclusively and finally, that her vote on defendant Kay was for guilty beyond a reasonable doubt and that it was her own vote -- free from any coercion. It is also important that Juror No. 10, to my observation was an attentive and an active member of the jury. She requested on her own upon the return to the jury box of the jury that certain portions of testimony be re-read and thereafter expressed satisfaction with the re-reading. Transcript of Jury Deliberations, December 22, 1976, at pp. 33, 35 and 54. It is inappropriate to speculate as to her views during the course of deliberations except to acknowledge that even if, arguendo, she joined the majority on the jury later on in the deliberations or for purposes of unanimity and rendering a verdict, this is neither improper or even abnormal. See Grace Lines, Inc. v. Motley, supra; Cook v. United States, supra.

As noted before, this trial was quite lengthy and the attorneys, prosecution and defense, proceeded with vigor and strong advocacy, yet absolute courtesy to each other and to the Court, and decorum prevailed at all times. The record and the minutes of the courtroom clerk show that the jury actually deliberated in their jury room for a relatively short period of time and exhibited to my on-the-scene observation no signs of animosity, hostility or impatience with each other upon their substantial number of returns to the courtroom. In fact, their attitude was one of friendliness and respect to each other with evident determination to render final decision in the

case that night, despite my express offer to terminate their deliberations and to return the following morning to continue.

Counsel for defendant Kay requested an opportunity to interrogate the jury before they were excused, which request was denied at that time. Transcript of Proceeding at 11:35 p.m., supra, pp. 31-32. Upon his oral argument of this Rule 33 motion, counsel as I recall after he searched the pertinent case law commendably conceded he had no right legally to so question the jury during the polling. See Miller v. United States, 403 F.2d 77, 83-84 (2d Cir. 1968); cf. Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224, 225 (D.C. Cir. 1942); Curry v. Moore McCormick Lines, Inc., 51 F.R.D. 301, 303 (S.D.N.Y. 1970). There was no request or motion made by any attorney for direction to have the jury deliberate further before the jury was finally excused. See Jackson v. United States, supra, 386 F.2d at 643; see also United States v. Duke, supra, 527 F.2d at 394; Amos v. United States, supra, 496 F.2d at 1273; United States v. McCoy, supra, 429 F.2d at 742. The failure to so move during the trial is not considered a necessary factor in denying these motions since it is my judgment as the trial judge who participated actively, there is no merit to defendants' contention that Juror No. 10 did not render an uncoerced vote of guilty upon the indictments of all four defendants, including defendant Kay or that her votes were not based on understanding of the instructions or should be considered as other than ones made of her own volition. From my observations, there was no disagreement by any outward manifestation by any juror in the jury box when Foreman Chow announced the verdicts of guilty for each defendant before the individual polling was conducted. In light of my determination that defendant Kay suffered no prejudice during the polling procedure and that the verdict of guilty should stand as a unanimous one against Kay, it follows unquestionably that the verdicts against Cooney, Levy and LeFebvre, in which there was no hesitation by any juror in

the individual polling, must stand and the motions in their behalf based on this ground also be denied.

These three defendants, excepting defendant Kay, do present the alternate ground for a new trial based on the allegation that Mr. Chow, selected by the jurors under our system as the Foreman, did make or might have made improper use of his notes and the Court should, at the least, have conducted a hearing to determine whether such improper use during jury deliberation was made of these personal notes. It should be emphasized again that defendant Kay makes no claims on this challenge to the note-taking, admittedly discretionary in the Second Circuit. See United States v. Bertolotti, 529 F.2d 149, 159-60 (2d Cir. 1975).

As I commented to the attorneys after the jury was excused, I considered Mr. Chow to be "one of the most exceptional jurors that we have ever had . . ." Transcript of Proceeding at 11:35 p.m., December 22, 1976, supra, at pp. 36-37. In regard to his note-taking, no objection was made when I first observed it to my granting permission to take notes or to my cautionary instructions given at that time. See Transcript of Proceedings on December 2, 1976. There were objections made by defense counsel after the verdict which amounted to a contention that whenever a juror takes notes, the court should conduct a hearing pro forma, to investigate their use. I did have the juror go back to the jury room and obtain the notes available, and those notes were marked into the record as a court exhibit. The notes as I read them are cryptic, with summaries of witnesses' testimony, with no comments about evaluation of the truth or worth of such testimony. There is nothing shown in the record or elicited by my questioning that would support any suspicion that Foreman Chow made improper use of his personal notes that were made during recesses or after court sessions. See Transcript of Proceedings of 11:35 p.m., December 22, 1976, supra, at pp. 15-24. I have filed as stated those portions of his notes which were available as Court

Exhibit No. 10, and have reviewed them myself. To describe them again: They are simply a cryptic chronicle of the times the various witnesses testified and the briefest description without conclusions drawn of the highlights of their testimony. Since the trial covered a three-week period with interruptions that occurred due to other responsibilities of the Court, with a large number of witnesses examined and cross-examined, I find no basis to suggest that either the note-taking by this exceptionally intelligent juror or their use to refresh his memory of the testimony was improper.

Finally, I find no merit to the suggestion that the lateness of the hour or the day long deliberations with the incidents described in the individual polling amounted to serious problems that should warrant the setting aside of the verdict and the granting of a new trial. Careful inquiries were made of the jury concerning their ability and desire to continue deliberations at 9:45 p.m. [Transcript of Jury Deliberations of December 22, 1976 at pp. 39-48] and at 10:40 p.m. [Id., at pp. 48-55]. The jury stated through its Foreman, after he looked at the others in the jury box for their state of mind, that the jury wished and were willing to continue their jury deliberations. It is important to point out, in my judgment, as the presiding judge on the scene, that the jury deliberations were as uneventful and dispassionate as I have ever observed at the conclusion of a long criminal jury trial. There was no thought of giving a modified Allen charge, which is the only one I give when necessary, because really with all the time consumed in reading substantial amounts of testimony and the departure of the jury from the building for an hour and a half or more to have dinner at one of Albany's finest restaurants, located just across the street, the deliberations cannot be considered as prolonged ones which would bear down or tax the stamina of the jury to such an extent as to overcome their independent convictions as to the guilt of these defendants.

There was no indication to me or observation at the actual

trial scene that we had a weary and tired jury which was unduly and unfairly pressed to agree to a verdict after an exhausting day, as the counsel for defendant Kay attempts to portray. This beleaguered jury picture, painted by defense counsel, simply was not the fact as the record of jury deliberations, their return into the courtroom on several occasions, and their unanimous agreement to continue indicates. The jury had their lunch arranged for them to eat shortly after my instructions ended at 11:05 a.m. The jury came back a number of times during the day after notes were given to the Deputy Marshal for the Court which notes contained precise and pointed questions therein concerning parts of the testimony the jury desired to read. The notes are part of the record. Significant time was also consumed for the attorneys and court reporters to agree on the portions of the testimony to be re-read. There were no requests for any clarification of the instructions that were given or any such indication in the notes when the jurors returned to open court that the jury wanted the Court to give further clarification of the instructions.

No matter the attempt to dramatize a slight ripple in an otherwise uneventful trial and jury deliberation into an incident of utmost gravity and seriousness, it must be remembered that the jury returned its verdict at 11:35 p.m. of the same day. The entire incidents of polling the jury individually after the collective agreement on guilty verdicts, the subsequent questioning of jurors Earl and Chow by the Court, the hearing of motions for each defendant to set aside the verdicts, according to the courtroom Deputy Clerk's minutes [filed with this decision] was over by 12:15 a.m.; surely not an inordinate amount of time. The questioning of both jurors could not have exceeded a 15 to 20 minute period at the most. It should be said that there was no handwringing or sobbing on the part of Juror Earl after she expressed her doubt, in a soft spoken manner, about the guilt of Kay; there was no emotional scene at all. To my

observation, she was only stating, in her own way, the difficulties she had to overcome and that were on her mind in order to resolve the doubts and agree with the other jurors concerning defendant Kay. Unless it was completely out of character, at least as observers have described, in the past, my courtroom attitude and manner as a trial judge, there was no intent on my part by the content of my questions or the tone of delivery to coerce or pressure in any way Juror Earl from expressing the verdict she wanted to render. Of course, it is self-serving, but my interpretation of the transcript is that she voluntarily and without coercion expressed joinder in the verdict of guilty against defendant Kay.

In conclusion, the two separate motions for a new trial, on behalf of defendant Kay and jointly on behalf of defendants Cooney, Levy and LeFebvre, under Fed. R. Crim. Pro. 33, for a new trial are denied and dismissed. The verdicts of guilty shall stand against all defendants and the sentencing scheduled for Tuesday, February 22, 1977, shall take place.

It is so Ordered.

Dated: February 15, 1977

Albany, New York

James T. Foley
UNITED STATES DISTRICT JUDGE

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1 from the jury.

2 THE CLERK: Ladies and Gentlemen of
3 the Jury, have you agreed upon a verdict, and if so,
4 how do you find, and who shall say for you?

5 FOREMAN CHOW: Yes, sir.

6 Yes, Your Honor, sir: all of us here,
7 we all find the Defendants Mr. Cooney, guilty; Mr.
8 Lefebvre, guilty; Mr. Levy, guilty; Mr. Kay, guilty.

9 THE CLERK: Harken to your verdict,
10 Ladies and Gentlemen, as the Court has recorded it.
11 You say that you find each Defendant guilty, and so
12 say you all?

13 THE COURT: I will ask you, do you have
14 anything to say?

15 FOREMAN CHOW: No, sir.

16 THE COURT: I want to ask Counsel now?

17 MR. LOMBARDINO: Your Honor, I would
18 like to have the jury polled.

19 THE COURT: Each one of them?

20 MR. LEBETKIN: I join in that.

21 MR. LEONE: Yes, I do.

22 MR. RYAN: Mr. Bruce Kay joins in that.

23 THE COURT: We will poll them on each
24 of the four Defendants. Take them in that order.

25 Cooney, Levy, Lefebvre, and Kay.

1 THE CLERK: As your name is called,
2 please indicate your verdict.

3 Juror Number 1, Charles Chow?

4 JUROR NO. 1 (CHOW): Guilty.

5 THE CLERK: Juror Number 2, Stephen

6 Cadalso.

7 JUROR NO. 2 (CALDALSO): Guilty.

8 THE CLERK: Juror Number 3, Marguerite

9 Haines.

10 JUROR NO. 3 (HAINES): Guilty.

11 THE CLERK: Juror Number 4, Ronald

12 Dessormeau.

13 JUROR NO. 4 (DESSORMEAU): Guilty.

14 THE CLERK: Juror Number 5, Eileen

15 Slawsby.

16 JUROR NO. 5 (SLAWSBY): Guilty.

17 THE CLERK: Juror Number 6, Theresa

18 Meyers.

19 JUROR NO. 6 (MEYERS): Guilty.

20 THE CLERK: Juror Number 7, Arnold

21 Glover.

22 JUROR NO. 7 (GLOVER): Guilty.

23 THE CLERK: Juror Number 8, Lawrence

24 Mudrey.

25 JUROR NO. 8 (MUDREY): Guilty.

1 THE CLERK: Juror Number 9, Joseph
2 Jankovic.
3 JUROR NO. 9 (JANKOVIC): Guilty.
4 THE CLERK: Juror Number 10, Judith
5 Earl.
6 JUROR NO. 10 (EARL): Guilty.
7 THE CLERK: Juror Number 11, Michael
8 Green.
9 JUROR NO. 11 (GREEN): Guilty.
10 THE CLERK: Juror Number 12, Elizabeth
11 Catalano.
12 JUROR NO. 12 (CATALANO): Guilty.
13 THE CLERK: Now, as regards the
14 Defendant Harold Levy, Jr. Juror Number 1, Charles
15 Chow.
16 JUROR NO. 1 (CHOW): Guilty.
17 THE CLERK: Juror Number 2, Stephen
18 Cadalso.
19 JUROR NO. 2 (CADALSO): Guilty.
20 THE CLERK: Juror Number 3, Marguerite
21 Haines.
22 JUROR NO. 3 (HAINES): Guilty.
23 THE CLERK: Juror Number 4, Ronald
24 Dessormeau.
25 JUROR NO. 4 (DESSORMEAU): Guilty.

1 THE CLERK: Juror Number 5, Eileen
2 Slawsby.
3 JUROR NO. 5 (SLAWSBY): Guilty.
4 THE CLERK: Juror Number 6, Theresa
5 Meyers.
6 JUROR NO. 6 (MEYERS): Guilty.
7 THE CLERK: Juror Number 7, Arnold
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9 JUROR NO. 7 (GLOVER): Guilty.
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12 JUROR NO. 8 (MUDREY): Guilty.
13 THE CLERK: Juror Number 9, Joseph
14 Jankovic.
15 JUROR NO. 9 (JANKOVIC): Guilty.
16 THE CLERK: Juror Number 10, Judith Earl.
17 JUROR NO. 10 (EARL): Guilty.
18 THE CLERK: Juror Number 11, Michael
19 Green.
20 JUROR NO. 11 (GREEN): Guilty.
21 THE CLERK: Juror Number 12, Elizabeth
22 Catalano.
23 JUROR NO. 12 (CATALANO): Guilty.
24 THE CLERK: In regard to Defendant John
25 Lefebvre, Juror Number 1, Charles Chow.

1 THE CLERK: Juror Number 10, Judith
2 Earl.
3 JUROR NO. 10 (EARL): Guilty.
4 THE CLERK: Juror Number 11, Michael
5 Green.
6 JUROR NO. 11 (GREEN): Guilty.
7 THE CLERK: Juror Number 12, Elizabeth
8 Catalano.
9 JUROR NO. 12 (CATALANO): Guilty.
10 THE CLERK: Now, as regards to Defendant
11 Bruce Kay. Juror Number 1, Charles Chow.
12 JUROR NO. 1 (CHOW): Guilty.
13 THE CLERK: Juror Number 2, Stephen
14 Cadalso.
15 JUROR NO. 2 (CADALSO): Guilty.
16 THE CLERK: Juror Number 3, Marguerite
17 Haines.
18 JUROR NO. 3 (HAINES): Guilty.
19 THE CLERK: Juror Number 4, Ronald
20 Dessormeau.
21 JUROR NO. 4 (DESSORMEAU): Guilty.
22 THE CLERK: Juror Number 5, Eileen
23 Slawsby.
24 JUROR NO. 5 (SLAWSBY): Guilty.
25 THE CLERK: Juror Number 6, Theresa

1 JUROR NO. 1 (CHOW): Guilty.
2 THE CLERK: Juror Number 2, Stephen
3 Cadalso.
4 JUROR NO. 2 (CADALSO): Guilty.
5 THE CLERK: Juror Number 3, Marguerite
6 Haines.
7 JUROR NO. 3 (HAINES): Guilty.
8 THE CLERK: Juror Number 4, Ronald
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10 JUROR NO. 4 (DESSORMEAU): Guilty.
11 THE CLERK: Juror Number 5, Eileen
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13 JUROR NO. 5 (SLAWSBY): Guilty.
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16 JUROR NO. 6 (MEYERS): Guilty.
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5 JUROR NO. 7 (GLOVER): Guilty.

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8 JUROR NO. 8 (MUDREY): Guilty.

9 THE CLERK: Juror Number 9, Joseph
10 Jankovic.

11 JUROR NO. 9 (JANKOVIC): Guilty.

12 THE CLERK: Juror Number 10, Judith
13 Earl.

14 JUROR NO. 10 (EARL): I would like to
15 say not sure, but I say guilty because of the other --
16 realizing that all --

17 THE COURT: (Interrupting) Speak right
18 out.

19 JUROR NO. 10 (EARL): I would like to
20 say, not sure, but realizing that I am not going to
21 persuade eleven jurors to change their vote.

22 THE COURT: What is your verdict, your
23 judgement?

24 JUROR NO. 10 (EARL): Guilty.

25 THE COURT: All right.

1 THE CLERK: Number 11, Michael Green.

2 JUROR NO. 11 (GREEN): Guilty.

3 THE CLERK: Juror Number 12, Elizabeth
4 Catalano.

5 JUROR NO. 12 (CATALANO): Guilty.

6 THE COURT: Miss Earl, I am going to
7 ask you, particularly on this last call that we had:
8 did you surrender any convictions because of any
9 pressures on you, or is that your judgement that you
10 find that this Defendant Kay is guilty? You have to
11 use your own judgement.

12 JUROR NO. 10 (EARL): I definitely feel
13 pressures.

14 THE COURT: What did you say?

15 JUROR NO. 10 (EARL): I definitely
16 feel pressures.

17 THE COURT: I can't hear you.

18 JUROR NO. 10 (EARL): I definitely feel
19 pressure on this decision.

20 THE COURT: What kind of pressure?
21 Did you listen to the opinions of the other jurors?

22 JUROR NO. 10 (EARL): Yes. I have
23 requested that we ask Your Honor to review the legal
24 advice, or the legal charge that you gave us about the
25 conspiracy, relating to the part where they said that

1 they would have to be involved in only a small portion
2 of the conspiracy, or not to be convicted --

3 THE COURT: Well, isn't that --

4 JUROR NO. 10 (EARL): I don't know.

5 THE COURT: Wasn't that made clear to
6 you?

7 JUROR NO. 10 (EARL): The other point
8 that I had some doubt on, and I am only saying this
9 because of my reasonable doubt, and I feel that it is
10 reasonable, was the points that were made about Bruce
11 Kay taking over the conspiracy, and I felt that I have
12 reasonable doubt about that.

13 THE COURT: Well, I have to inquire,
14 because we are in an awkward position: you were polled
15 here and the question is, do you find Kay guilty under
16 the law as I charged you, and on the testimony given
17 in this case.

18 How old are you?

19 JUROR NO. 10 (EARL): Twenty-five.

20 THE COURT: And was any coercion placed
21 upon you to return a verdict here?

22 JUROR NO. 10 (EARL): No. I don't --
23 I mean the only one I felt unsure of, having any doubt
24 on, was that last Defendant, was Bruce Kay, and I have --

25 THE COURT: You may have felt, but did

1 you finally reach a conclusion that you want reported
2 and made part of the verdict in this case?

3 JUROR NO. 10 (EARL): Yes, I said that
4 I do.

5 THE COURT: And you do that freely,
6 and that is the point that we are trying to find out.
7 Are you under any pressure? It is your judgement, your
8 own mind has to make the decision.

9 JUROR NO. 10 (EARL): I concede that
10 Bruce Kay is guilty.

11 THE COURT: Do you say he is guilty?

12 JUROR NO. 10 (EARL): Yes.

13 THE COURT: Now, I am going to take
14 her verdict and her judgement.

15 That happens in many instances when
16 reasonable doubt arises in the minds of the jurors,
17 that your judgement has to be made.

18 MR. RYAN: Your Honor, under the
19 circumstances, that she has explained --

20 THE COURT: Do you find he is guilty?
21 I am going to ask you directly.

22 JUROR NO. 10 (EARL): Yes, I find that
23 he is guilty.

24 THE COURT: That is your finding as a
25 juror, to apply the law and listen to the facts and

1 the testimony and reach a judgement, and is that your
2 judgement?

3 JUROR NO. 10 (EARL): Yes, sir.

4 THE COURT: Is it?

5 JUROR NO. 10 (EARL): Yes, sir.

6 THE COURT: Now is the time to express
7 it. You have two things, guilty or not guilty.

8 JUROR NO. 10 (EARL): Guilty.

9 THE COURT: All right.

10 MR. RYAN: May I inquire?

11 THE COURT: No, I am going to accept
12 the verdict.

13 MR. LOMBARDINO: I have an application.

14 THE COURT: What is your application?

15 MR. LOMBARDINO: In the early part of
16 this trial, it was quite obvious that the Foreman,
17 Mr. Chow, was taking notes. As a matter of fact,
18 Your Honor inquired. I recall before where Mr. Chow
19 stood up concerning some of the examination; he was very
20 specific about Roth's testimony concerning, it is a
21 meeting that was quite well fixed in Mr. Chow's mind.

22 I respectfully request the Court, at
23 this time, to have Mr. Chow's notes produced and marked
24 either as a Court Exhibit or marked as a Defendants'
25 Exhibit.

1 THE COURT: Well, I will ask Mr. Chow:
2 do you have those notes, sir?

3 JUROR NO. 1 (CHOW): That was the one
4 time that I tried to, Your Honor, give it back to the
5 Marshal, and that was during your observation, Your
6 Honor, sir. I had those notes, and that was written
7 on some of a napkin.

8 THE COURT: Had you shown those notes
9 or discussed them with any other jurors?

10 JUROR NO. 1 (CHOW): I did jot down my
11 memory from time to time.

12 THE COURT: You mean, during the trial,
13 or what?

14 JUROR NO. 1 (CHOW): I was sitting in
15 the juryroom, I did that, and tried to have my own
16 memory refreshed.

17 THE COURT: No, I deny the application.

18 MR. LOMBARDINO: Can't we have them
19 marked. I just wantto have the notes marked.

20 THE COURT: I don't think that we need
21 it. I don't think that there is any prejudice or harm,
22 or no discussion at the time it was developed. It was
23 brought out in open court, and I told him that he had
24 the right to continue making them if he wanted to, and
25 nobody said a word about it.

1 MR. LOMBARDINO: I was not in the
2 juryroom, and I respectfully submit, Your Honor, was
3 not either. That may have been a contributing part,
4 if Mr. Chow referred to his notes, and then spoke.

5 THE COURT: No, I have no doubt about
6 it. Where are the notes, and do you have them,
7 Mr. Marshal?

8 MARSHAL BRINKMAN: No, I never touched
9 them. You said that they were all right for him
10 to keep and he offered them to me, and I said that they
11 are yours, and what do you want with them.

12 THE COURT: Do you have them in your
13 possession now?

14 JUROR NO. 1 (CHOW): Not those notes, sir.

15 THE COURT: What did you do with those
16 notes?

17 JUROR NO. 1 (CHOW): I probably threw
18 them away.

19 THE COURT: The ones that you were taking
20 in the jurybox?

21 JUROR NO. 1 (CHOW): Some of them I had
22 with me here.

23 THE COURT: Do you have those notes?

24 JUROR NO. 1 (CHOW): Yes, I have
25 those notes. No, I didn't take them from here.

1 THE COURT: The ones in the jurybox that
2 you were taking?

3 JUROR NO. 1 (CHOW): No, those, that was
4 from, no, I probably destroyed them.

5 THE COURT: You destroyed them?

6 JUROR NO. 1 (CHOW): Right.

7 JUROR NO. 10 (EARL): I have no objections
8 to it, but there are notes in there, written by him, and
9 I have no objection to it.

10 THE COURT: We have a policy. This is
11 not very unusual, and I am not upset about it at all
12 because this is our jury function, and I am satisfied
13 that you gave the case conscientious deliberation, and
14 you were extremely perceptive in the questions that you
15 posed in your written notes, and your attention was
16 shown by the perception that you had about different
17 parts of the testimony.

18 I am satisfied that you followed the
19 testimony and applied the law, and you gave the case
20 careful and lengthy consideration. I think we still have
21 to poll Number 11 and 12 on the last one, Kay. We are
22 polling the verdict that was first returned by Mr.
23 Chow for the entire group. We will take 11 and 12.

24 THE CLERK: Juror Number 11, Michael
25 Green.

1 JUROR NO. 11 (GREEN): Guilty.

2 THE CLERK: Juror Number 12, Elizabeth
3 Catalano.

4 JUROR NO. 12 (CATALANO): Guilty.

5 THE COURT: All right.

6 MR. LOMBARDINO: Is the record clear,
7 Your Honor, that there was mention made that there were
8 notes in the juryroom?

9 THE COURT: I think that there are a lot
10 of things that are not too serious. As far as I
11 understood, Mr. Chow, on your own, you made notes as
12 you went back in, and later thad those to jog your
13 memory during the discussion, and that was the type of
14 notes that you mean?

15 JUROR NO. 1 (CHOW): That is right. But
16 the notes that I took --

17 THE COURT: Not that they were taken
18 here as the testimony was going on?

19 JUROR NO. 1 (CHOW): No, sir, that was
20 destroyed. That was written on tissue.

21 THE COURT: And used to refresh your own
22 memory?

23 JUROR NO. 1 (CHOW): Yes, sir.

24 THE COURT: And made during the times
25 that you were sitting in the juryroom? Is that right?

1 JUROR NO. 1 (CHOW): That was the time
2 that I heard all of the testimony and sometimes it was
3 during the evening, and sometimes it was when we were
4 just in the juryroom and I jotted down some of the points.

5 THE COURT: And then you kept those notes?

6 JUROR NO. 1 (CHOW): Yes, but only
7 partially, and not the complete text.

8 MR. LOMBARDINO: May we inquire if he now
9 has the notes in his possession, and if at any time
10 he referred to those notes in front of the jury?

11 THE COURT: Was it wrong if he did?

12 MR. LOMBARDINO: I respectfully submit
13 that there is a lot wrong about that. If Mr. Chow
14 used some notes in connection with the jury in his
15 deliberations in that juryroom, this is not proper,
16 Judge. It is not the function of any one juror to
17 take notes, and then attempt to use them to refresh
18 the recollection of other jurors.. If that had to be
19 done, the way to do it is on the record, through a
20 re-reading of the testimony, and not by the use of
21 one individual's notes. It might very well have been
22 that a point or two had been written down, and mis-
23 construed by the author of those notes, and that might
24 very well have transpired.

25 THE COURT: No, I am --

1 MR. LOMBARDINO: I am sure that he has
2 notes in his pocket now.

3 THE COURT: Please, I am satisfied
4 that everything was well --

5 MR. LOMBARDINO: I have a record to
6 protect, and I am sure that the Court appreciate that.

7 THE COURT: Are the notes in existence
8 in the juryroom?

9 JUROR NO. 1 (CHOW): Very partial, and
10 I jotted down two points --

11 THE COURT: Can you find these , and are
12 they in existence in the juryroom?

13 JUROR NO. 1 (CHOW): Yes, I could find
14 out whatever is there if that is what you want.

15 THE COURT: I mean, to satisfy this
16 attorney, go and get those pages, and can you find them?

17 JUROR NO. 1 (CHOW): Yes.

18 THE COURT: And file them with the Clerk.

19 MR. LEONE: I join with Mr. Lombardino.

20 MR. RYAN: I join in that.

21 MR. LEBETKIN: We all join in that,

22 Judge.

23 (Whereupon, Juror No. 1 (CHOW), left
24 the jurybox, went into the juryroom, and returned
25 to the jurybox)

1 THE COURT: All right, Mr. Chow, I have
2 four pages, and these are the notes that you made
3 personally, yourself?

4 JUROR NO. 1 (CHOW): Yes.

5 THE COURT: And you might as well state,
6 what is your occupation and profession?

7 JUROR NO. 1 (CHOW): Engineer, sir.

8 THE COURT: And where are you employed?

9 JUROR NO. 1 (CHOW): General Electric
10 Company, Schenectady, New York.

11 THE COURT: So I will file these for the
12 record as a Court Exhibit, and in the proper order.

13 MR. LOMBARDINO: Thank you, Your Honor.

14 THE COURT: And, Mr. Lombardino, you
15 can have xeroxed copies of them.

16 MR. LOMBARDINO: That is very fine,
17 Your Honor, and I appreciate it.

18 THE COURT: So, Ladies and Gentlemen,
19 as I told you, I am satisfied that you delivered a
20 conscientious, careful verdict, and one made after the
21 attention that the case deserved, and it was a
22 difficult case, and covered a long period of time.

23 There was a lot of testimony, and the
24 evidence, several days that you followed it, and that is
25 what we want.

1 MR. LEONE: Your Honor --

2 THE COURT: Please, let me talk to
3 the jurors.

4 MR. LEONE: I am sorry. Go ahead.

5 THE COURT: So we had another question
6 arise earlier in the case, and this is quite unusual.
7 I will take the jury board because to keep the entire
8 record absolutely clear, as they was -- perfectly clear
9 is the expression.

10 I am going to ask your ages, because
11 there was a question raised about people of certain ages
12 passing upon younger people who are involved in this
13 case.

14 I don't know, and the Ladies may not
15 like it, but there are not too many people in the
16 courtroom and we will keep this confidential.

17 Mr. Chow?

18 JUROR NO. 1 (CHOW): I am fifty.

19 JUROR NO. 2 (CADALSO): Twenty-five.

20 JUROR NO. 3 (HAINES): Forty-six.

21 JUROR NO. 4 (DESSORMEAU): Thirty-six.

22 JUROR NO. 5 (SLAWSBY): Fifty-three.

23 JUROR NO. 6 (MEYERS): Forty-nine.

24 JUROR NO. 7 (GLOVER): Forty-one.

25 JUROR NO. 8 (MUDREY): Twenty-five.

1 JUROR NO. 9 (JANKOVIC): Thirty-four.

2 JUROR NO. 10 (EARL): Twenty-five.

3 JUROR NO. 11 (GREEN): Twenty-two.

4 JUROR NO. 12 (CATALANO): Forty-nine.

5 THE COURT: I think that the average
6 age is youthful. I will say that for the record.

7 JUROR NO. 6 (MEYERS): Thank you.

8 THE COURT: So, Ladies and Gentlemen,
9 I am going to discharge you now, and the processes of
10 the law will be carried on.

11 Again, I want to express my appreciation.
12 You spent a lot of time in here, and you were a good
13 jury, and you were punctual and gave the case a
14 consideration that it deserved. We expect, and we
15 hope to have criminal and civil cases ready, but not
16 ready to start until Tuesday, January 4th, so I am going
17 to excuse you and wish you a happy holiday season.

18 Mr. Lebetkin has something to say, and
19 I don't know what it is.

20 MR. LEBETKIN: Would you please inquire
21 of the jurors if any one of them has visited or passed
22 the scene of this incident, talked about in this case.

23 THE COURT: I don't understand it,
24 myself. I don't know how to ask it.

25 MR. LEBETKIN: Well, there was a house

1 in question, in Latham, and I would like to know
2 whether or not any of the jurors visited the location.

3 THE COURT: I am not going to allow
4 that. I think that we are getting down to minuscule
5 matters. I am not going to ask them that.

6 MR.LEBETKIN: I am informed that Number
7 9 Juror made some reference to Crescent, and I don't
8 even know that that was about, but I thought that the
9 record should be clear.

10 THE COURT: That Juror Number 9 did what?

11 MR. LEBETKIN: Made a reference to
12 Crescent, and we are not sure what he meant by it. But
13 there was testimony in the record about the house in
14 question, or was it Catskill Street?

15 THE COURT: No, I think that that
16 is over-reaching with the jury. I don't know. Juror
17 Number 9, did you pass a house in Crescent?

18 JUROR NO. 9 (JANKOVIC): No, it might
19 have been when we were discussing Bruce Kay bringing
20 the camper to which house. As far as going past any
21 houses, no.

22 THE COURT: Did you go up and look at
23 any house that that lawyer is talking about?

24 JUROR NO. 9 (JANKOVIC): The closest
25 I have been to any house, I have been to Sears, and

1 we have a central office on Grooms Road in Clifton
2 Park, and that is the only place that I went to.

3 I am a switchman for the New York
4 Telephone Company.

5 THE COURT: I am satisfied with your
6 verdict; highly satisfied, and so I thank you very
7 much, and ask you to return on January 4th, and I wish
8 you all a happy holiday.

9 JUROR NO. 1 (CHOW): Happy holiday
10 to you, sir.

11 (Whereupon, the jury was excused.)

12 THE COURT: Now, what I do, I assume
13 Mr. Dreyer may move to sentence tonight?

14 MR. DREYER: I move or request that it
15 be deferred, and it is the practice of this Court to
16 move for sentencing, but it is a practice of the Court
17 also to move for sentencing after the pre-sentence
18 report.

19 THE COURT: Well, I have to take the
20 Motions with regard to the jury verdict.

21 MR. DREYER: Yes, sir.

22 THE COURT: I will take those at this
23 time.

24 MR. RYAN: Of course, on behalf of
25 the Defendant Bruce Kay, I move to set aside the verdict

1 as contrary to the credible evidence in the case,
2 and the second ground for my Motion is that Bruce Kay
3 did not receive a verdict based on twelve independent
4 votes, by people who were convinced of the evidence
5 beyond a reasonable doubt.

6 The colloquy and the statement made
7 here by Juror Number 10, unequivocally shows in my
8 judgement, that this 25-year-old woman had a reasonable
9 doubt as to Bruce Kay's guilt.

10 I know, Judge, that in your leading and
11 your examining of this jury, she felt that she did,
12 in the juryroom, she had to concede that her vote should
13 be guilty. She definitely stated, and we all heard it,
14 that she only bowed because she felt she couldn't per-
15 suade the others, and she stated, and I think that the
16 Court Reporter picked it up, that she was pressured into
17 a vote.

18 I will do some research on that matter,
19 and make an appropriate Motion, based on this juror's
20 examination.

21 In addition, Judge, I am going to make
22 an effort to interview the juror, and I want to put
23 that on the record, too, in support of my Motion.

24 So based on those matters, I wish to
25 move to set aside the verdict against Mr. Kay.

1 THE COURT: Mr. Dreyer, do you want to
2 reply to that, for the record?

3 MR. DREYER: No, I think that the
4 question about the juror was handled by the Court without
5 intervention by the Government.

6 THE COURT: I will deny the Motion. I
7 am well satisfied with the decision that she made, and,
8 of course, that is part of the jury process at this time.
9 People change, and judgements are changed by opinions,
10 and exchange, and one from the other, and so forth. That
11 is part of our system.

12 MR. RYAN: But when she set in this chair,
13 and she was polled and asked whether or not -- what her
14 vote was, she could not answer guilty when she was asked
15 that question, and she gave an explanation.

16 THE COURT: I am content to stay on her
17 verdict as she expressed it finally and flatly that she
18 found the Defendant guilty.

19 MR. RYAN: I think that, Judge, I should
20 have been afforded an opportunity to have made an
21 inquiry of the juror before Your Honor accepted her
22 verdict.

23 THE COURT: Well, you stated that for
24 the record. I don't think that you are so entitled.

25 Mr. Lombardino?

1 MR. LOMBARDINO: On behalf of Defendant
2 Cooney, I respectfully, at this time, move to set aside
3 the verdict on the ground that it is contrary to the
4 credible evidence, and the Government has failed to
5 prove guilt beyond a reasonable doubt.

6 In addition, thereto, Your Honor, I
7 respectfully move to set aside the verdict on the
8 grounds that the guilty verdict, apparently, now,
9 especially in light of the fact that Your Honor has
10 received four pages of notes from the Foreman, which
11 are not only notes that he has taken today, but apparently
12 this has been a running account of notes that he has
13 compiled on a day-to-day basis, whereby he has stated
14 to the Court that he wrote notes on napkins or tissues,
15 and he would throw them away, and transfer the notes
16 on these papers.

17 In addition thereto, it is quite clear
18 that Mr. Chow had these notes in the juryroom during the
19 course of the deliberations. As a matter of fact, Your
20 Honor, in asking, and in all fairness we did ask Mr.
21 Chow to produce those notes, and he had to leave the
22 Courtroom and go inside the juryroom and leave the
23 eleven sitting here, and he came back with four pages
24 of notes.

25 I submit to you, Your Honor, that this

1 is probably, and has far-reaching influence by Mr.
2 Chow, the Foreman of the jury, and on the other eleven
3 members, at any rate, and we will never know, because
4 we did not inquire as to what effect or what use those
5 notes were ultimately put to during the course of the
6 deliberations.

7 As a matter of fact, Number 10, the same
8 young lady who appeared so very upset when she returned
9 her verdict, as she said, she was not sure, indicated
10 that Mr. Chow had these notes, and was looking at them,
11 and speaking in relation to the notes during the course
12 of the deliberations, and therefore, I respectfully
13 submit that the verdict be set aside.

14 THE COURT: Motion denied.

15 MR. RYAN: May I be excused for a minute,
16 Judge; one minute?

17 THE COURT: I think that you should wait
18 until the other lawyers finish their Motions.

19 You want to go and see Miss Earl, don't
20 you?

21 MR. RYAN: I just want to -- I do.

22 THE COURT: You can go and see her.
23 She will be around.

24 MR. RYAN: She will be out of the
25 Courthouse.

1 THE COURT: She lives in Lake George,
2 and you can find her.

3 MR. LEBETKIN: Your Honor, I respectfully
4 move to set aside the verdict as being contrary to the
5 weight of the evidence, the credible evidence, and I
6 also would like to point out that Number 10, something
7 prompted Number 10 to indicate to Your Honor that perhaps
8 Mr. Chow was being less than candid with the Court with
9 respect to those papers, and the impression that I got
10 from Mr. Chow, when he was engaged in that colloquy with
11 Your Honor, was that he may have had a scratch paper
12 there, or a napkin in the juryroom, and something
13 insignificant.

14 That turns out to be four pages, and it
15 may very well be, Judge, that this woman was upset by
16 actions in the juryroom, including -- including what
17 Mr. Chow was doing.

18 Now, I am not really satisfied that there
19 was no undue influence on this woman. Not only with
20 respect to Bruce Kay, but as to the other Defendants in
21 this case, and particularly my client.

22 THE COURT: She didn't say she had any
23 trouble about that.

24 MR. LEBETKIN: She didn't say it speci-
25 fically, but the longer she talked, the more free she

1 got in what she said. She was apparently embarrassed to
2 say anything, to begin with.

3 I believe, Judge, that if that woman were
4 questioned, and of course, I am going to attempt to
5 question her also, and I would like to be clear on
6 the record, that a lot more may come out from that
7 woman than we heard on this record tonight, and it may
8 be that the entire verdict was taken, that woman was
9 the one that who, I indicated to Your Honor, leaned
10 over to Mr. Chow, earlier in the evening and wanted the
11 cross examination of Mr. Lombardino read. Now, the
12 cross examination on Roth may ver well have affected
13 Mr. Levy, because Mr. Levy was included in that conver-
14 sation.

15 I believe that some highly unusual
16 things happened here tonight, and probably some of
17 them are not known to us, and may never be known, but
18 I have an obligation to try and find out.

19 THE COURT: You may say that, but I don't
20 think that anything unusual happened. In fact, I think
21 that you had a very conscientious twelve people pass
22 upon the guilt or innocence. They demonstrated it
23 by the notes that they brought in, and by the time that
24 they spent in their deliberations.

25 As far as Mr. Chow is concerned, I would

1 make the statement: I have been on the Bench twenty-
2 eight years and I think that he is one of the most
3 exceptional jurors that we have ever had, and that these
4 notes were not taken to coerce or persuade anybody
5 unfairly. They were taken for his own refreshing of his
6 recollection.

7 I think that we would be better off,
8 in our system at times, if we had jurors of his caliber
9 and I would like to have that reviewed by the Court of
10 Appeals of the Second Circuit.

11 MR. LEBETKIN: I agree that he was
12 exceptional, but just how exceptional, I don't know.

13 THE COURT: I don't think that he had any
14 design to subvert any part of the law or the evidence.

15 MR. LEBETKIN: I don't infer that he
16 was trying to do anything wrong. He may have been
17 sincere in what he was doing, but he may have been
18 misdirected in his methods, and it may not conform to our
19 judicial system.

20 THE COURT: I will not engage in a great
21 defense. I think that the record will speak for itself
22 as to what his state of mind was. He acted as a Foreman,
23 and you addressed him as Foreman in the beginning, and
24 he gave careful consideration. I did not stop him from
25 taking notes. In fact, the case law in the Court of

1 Appeals, Second Circuit, said that I could allow him
2 or permit him and it should be allowed for him to take
3 notes right through the trial.

4 But I discourage it because I know that
5 it is not a good practice, at times, to have a juror
6 taking notes, and he tries to tell other jurors that they
7 are verbatim. I think that you will find the law in the
8 Court of Appeals, Second Circuit, supports my viewpoint.
9 I am quite satisfied with him.

10 MR. LEONE: On behalf of --

11 THE COURT: I deny the Motion on
12 behalf of Mr. Levy.

13 MR. LEONE: I move to set aside the
14 verdict, based upon the fact that it is contrary to the
15 weight of the credible evidence, as obtained in this
16 trial, and I join with my other colleagues to set aside
17 the verdict based upon the fact that the statements of
18 Mr. Chow, and the statements of Number 10 Juror who,
19 also, I might add, indicated her lack of knowledge as
20 to what a conspiracy was, and the Court did not allow
21 Mr. Ryan to go into it as to whether she understood
22 what the law was.

23 And whether Mr. Chow, or whether certain
24 of her requests weren't allowed to be reviewed in Court
25 or answered.

1
2 THE COURT: I think that the jurors have
3 a right to tell what they think that the law was that
4 was charged, and that is part of the jury system, too.
5 That is my reaction.

6 MR. LOMBARDINO: I forgot another point,
7 if I may please put it on the record, and it might be
8 extremely important to my client.

9 I would also like to indicate for the
10 record that when Juror Number 10 was polled, the first
11 time she was asked about her verdict concerning Kevin
12 Cooney, there was no response. As a matter of fact, the
13 second time she said it, it was so soft that I certainly
14 couldn't hear her from where I was sitting. At least,
15 that was my observation.

16 In addition thereto, Your Honor, and as
17 an officer of the Court, I make this representation to
18 you.

19 When we were inquiring of Mr. Chow in
20 regard to his notes, Juror Number 5 looked over, Miss
21 Slawsby, I think her name was, and asked about the notes.
22 I couldn't hear the conversation.

23 THE COURT: That is Mrs. Slawsby.

24 MR. LOMBARDINO: And I thank the Court
25 for permitting me to make these observations for the
sake of the record.

1 THE COURT: You are welcome.

2 MR. DREYER: I want to respond to one
3 thing.

4 THE COURT: I think that you should
5 respond, because we are all here in the Courtroom and
6 it is nice to have this atmosphere put on the record,
7 because it can be a picture that it not true of what
8 has transpired here.

9 MR. DREYER: My recollection of Number 10
10 Juror's response to the Clerk of the Court polling
11 Juror Number 10 was that the first time she was asked
12 about the guilt of Kevin Cooney that she responded guilty,
13 but that the Clerk did not hear her, and repeated the
14 question. I heard he say guilty and I will state that
15 for the record.

16 THE COURT: That is my recollection.

17 MR. LOMBARDINO: She said guilty, Your
18 Honor. The first time there was nothing that came out of
19 the woman's voice. Someone made inquiry, and she said
20 it so soft that it just barely was heard.

21 THE COURT: Well, I heard it twice, and
22 I don't know.

23 MR. LOMBARDINO: She also remarked, Your
24 Honor, that she was confused about the law as it
25 concerned the conspiracy.

1 THE COURT: I think that -- is there
2 anything else that you want to put on the record against
3 this verdict, because you have a jury that gave
4 conscientious deliberations. In my judgement, it was
5 approaching the best that I have ever seen.

6 What I am going to do: I deny all the
7 Motions and set aside the verdict for a new trial. You
8 can pursue whatever you want, because Mrs. Earl, as far
9 as I am concerned, I am not going to restrict your
10 talking to her or finding out anything.

11 MR. LOMBARDINO: Thank you.

12 THE COURT: You should not intrude too
13 much into the jury deliberations because it is a
14 hazardous thing at times.

15 But I am going to deny the Motions and
16 stand upon that denial and I am going to defer sentencing
17 of each and every Defendant in order for a pre-sentence
18 investigation.

19 And that means the Probation Department,
20 of course, will take up the pre-sentence investigation
21 procedures, and you should try and make some arrangement,
22 counsel for each Defendant, by calling and telephoning
23 the Probation Officer and making some arrangement for
24 interviews, and so forth.

25 So, I think that I will leave it in

